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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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170 pp

QUESTION PRESENTED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) creates a cost recovery remedy under which the government and "any other person" who incurs qualified environmental cleanup costs may recover those costs from any party liable under the Act. The question presented is:

Whether CERCLA § 107(a)'s private cost recovery remedy is available to:

(1) Only persons who incur the cost of conducting a qualified environmental cleanup, but are neither liable nor potentially liable under the Act's strict liability standard,

(2) Only persons who, though liable or potentially liable under the Act's strict liability standard, are themselves "blameless" of actual fault, or

(3) Any persons who incur the cost of conducting a qualified environmental cleanup, even if they themselves are liable or potentially liable under the Act?

LIST OF PARTIES

The Petitioners, Plaintiffs-Appellees below, are Cyprus Miami Mining Corporation, BHP Copper Inc., and Inspiration Consolidated Copper Company. These companies formed the Pinal Creek Group, an unincorporated association, to coordinate their efforts in conducting an environmental cleanup in the drainage basin of the Pinal Creek, located in an historic mining district near Globe, Arizona.

The parent, subsidiary and affiliated entities of the Petitioners (not including wholly owned subsidiaries) are as follows:

(1) Cyprus Miami Mining Corporation is an indirect subsidiary of Cyprus Amax Minerals Company. An affiliate or subsidiary of Cyprus Amax Minerals Company is Amax Gold, Inc.

(2) BHP Copper Inc., formerly known as Magma Copper Company, is a subsidiary of The Broken Hill Proprietary Company, Ltd.

(3) Inspiration Consolidated Copper Company is affiliated with Terra Industries, Inc.

The Respondents, Defendants-Appellants below, are Newmont Mining Corporation, Occidental Petroleum Corporation, CanadianOxy Offshore Production Company, and Atlantic Richfield Company (ARCO).

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, the members of the Pinal Creek Group, consisting of Cyprus Miami Mining Corporation, Inspiration Consolidated Copper Company, and BHP Copper Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 2, 1997.

OPINIONS BELOW

The opinion of the United States District Court for the District of Arizona is reported at 926 F. Supp. 1400 (1996) and is reproduced as Appendix B, from pages App. 22-59. The opinion and order denied Respondents' motion to dismiss Petitioners' CERCLA § 107(a) cost recovery claims. Respondents' motion urged that Petitioners, as potentially liable parties, could not assert cost recovery claims under § 107(a). The district court certified its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1994).

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 118 F.3d 1298 (1997) and is reproduced as Appendix A, from pages App. 1-21. The court of appeals granted the petition for interlocutory appeal, reversed the district court's order, and remanded with instructions to grant Respondents' motion to dismiss. 118 F.2d at 1306.

The Ninth Circuit held that Petitioners' CERCLA cost recovery claims must be dismissed because "[t]he text of § 107 leads to the conclusion that only a claim for contribution lies between [potentially liable parties]." *Id.* at 1301. Stating that "§ 113 should be applied to claims brought by a [potentially liable party], whenever possible," the court held that "while § 107 created the right of

contribution, the 'machinery' of § 113 governs and regulates such actions." *Id.*

The court explained that § 113 thus "provid[es] the details and explicit recognition that were missing from the text of § 107." *Id.* In reaching its decision to reverse, the court concluded that Petitioners created their own contribution liability against themselves by conducting an environmental cleanup:

> Although it is true that [potentially responsible party (PRP)] status, by itself, does not generate liability, the Pinal Group ignores the "necessary costs of response incurred by [it] consistent with the national contingency plan." Prior to its expenditure, the Pinal Group was not yet liable because no one, not the government, not any other PRPs or any non-PRP private parties had yet incurred any costs under § 107. However, once the Pinal Group undertook those "necessary costs of response," it, along with all PRPs associated with the Pinal Creek site, became partly responsible for those costs.

Id. at 1305-06 (citations omitted).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 2, 1997. On July 15, 1997, Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on August 11, 1997. *See* Appendix C, p. App. 60. Ninety days after that date is November 9, 1997, which fell on a Sunday. Petitioners have filed this petition on the following Monday, November 10, 1997. Therefore, this petition is timely. *See* Sup. Ct. R. 13.1, 13.3 and 30.1.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(*l*) (1994). The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to the procedures for a discretionary certified interlocutory appeal set forth at 28 U.S.C. § 1292(b) (1994). The United States District Court for the District of Arizona has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 42 U.S.C. § 9613(b) (1994).

STATUTES INVOLVED

The statutory provisions involved in this case are: 42 U.S.C. § 9607(a), 42 U.S.C. § 9613(f), 42 U.S.C. § 9613(g), and 42 U.S.C. § 9606 (1994). The pertinent text of these provisions is set out as Appendix D, from pages App. 61-80.

STATEMENT OF THE CASE

For many years, Petitioners have been conducting an extensive and complicated environmental cleanup of groundwater contaminated by a century of mineral processing in one of the Nation's largest and most historic mining districts, near Globe, Arizona.[1] In 1990,

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[1] The United States District Court for the District of Arizona, the court of first instance, has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 42 U.S.C. § 9613(b) (1994). Petitioners alleged the facts pertinent to this petition in the Second Amended Complaint in the action pending before the district court. This petition arises from the court of appeals' reversal of the denial of a motion to dismiss (and motion for judgment on the pleadings) challenging claims alleged in the Second Amended Complaint. Therefore, the facts alleged therein are assumed to be true. *See Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 693 (9th Cir. 1988) (stating that all allegations in the complaint must be accepted as true for purposes of resolving a motion under Fed. R. Civ. P. 12).

Petitioners formed the Pinal Creek Group to coordinate their efforts in conducting this cleanup.

If left unabated, the contaminated groundwater would reach the perennially flowing segment of the Pinal Creek and, from there, the Salt River and ultimately Roosevelt Lake, a major water source for the Phoenix metropolitan area. Petitioners, however, have taken interim remedial measures to prevent this problem from occurring. Petitioners have devoted millions to these measures and, through careful study, have developed a plan for a permanent cleanup of the problem. Petitioners estimate that the total cost of implementing a permanent cleanup will well exceed $100 million.

Each Respondent (or its predecessors) conducted or controlled mining or mineral processing that contributed to the contamination. Accordingly, the Arizona Department of Environmental Quality (ADEQ) asked Petitioners (two of which are current operators of mining properties in the district) and each of the Respondents (which ADEQ identified as former owners or operators of mining properties in the district) to help remediate this long-standing pollution. However, Respondents, Atlantic Richfield Company (ARCO), Occidental Petroleum Corporation, CanadianOxy Offshore Production Company, and Newmont Mining Corporation, all denied any liability and declined to help with the cleanup work or otherwise to respond to the environmental threat.

In 1991, Petitioners filed an action to recover cleanup costs from Respondents. Petitioners alleged, *inter alia*, a cost recovery claim against Respondents under CERCLA § 107(a). Petitioners also sought contribution from Respondents under CERCLA § 113(f) for the monies that Petitioners have reimbursed to the State of Arizona to cover ADEQ's expenses in

overseeing the cleanup. Respondents alleged counterclaims against Petitioners for contribution under CERCLA § 113(f).

On September 18, 1995, Respondent ARCO moved to dismiss Petitioners' cost recovery claims under CERCLA § 107(a). The remaining Respondents joined ARCO's motion and also moved for judgment on the pleadings on the same grounds. In their joint motions, Respondents argued that cost recovery claims under CERCLA § 107(a) may be brought only by so-called "innocent" parties – meaning parties that are not themselves liable or potentially liable under CERCLA's strict liability scheme. Respondents contended that Petitioners could bring claims only for contribution pursuant to CERCLA § 113(f).

The United States District Court for the District of Arizona denied Respondents' motions. The district court concluded that the "plain language" of CERCLA "clearly and unequivocally" grants standing to "any person," even a potentially liable party, who incurred necessary response costs to assert a cost recovery claim against any other potentially liable parties. *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1405-06 (D. Ariz. 1996). Accordingly, the district court held that Petitioners are entitled to invoke CERCLA § 107(a)'s private cost recovery remedy to recover their properly incurred cleanup costs from Respondents. *See id.*

Respondents disputed this ruling and moved to have the district court certify its order for an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit. Respondents observed that the order presented a question of law that they described as "hotly debated and inconsistently resolved both within the Ninth Circuit and around the country," and one that is of critical significance "to the parties in this and other private CERCLA actions." (Motion to Amend this Court's March 28, 1996 Order to Include a Statement Certifying the Order for Immediate Interlocutory Appeal

Pursuant to 28 U.S.C. § 1292(b) at 3, *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Ariz. 1996) (No. 91-CV-1764-ROS)). Respondents further noted that "substantial differences of opinion . . . already exist across the country on this issue," and that "so polar are the positions that every new opinion on the subject, whether officially published or not, is widely distributed to the environmental law community and added to the running tally." *Id.* at 7.

The district court granted Respondents' motion and certified the legal issue presented in this petition to the court of appeals. By order filed on July 15, 1996, the Ninth Circuit granted Respondents' petition for an interlocutory appeal to resolve an intra-circuit conflict regarding whether potentially liable parties may bring private cost recovery claims under CERCLA § 107(a).

In reversing the district court (and remanding with an instruction to grant Respondents' motion to dismiss), the court of appeals concluded that potentially liable parties may not bring private cost recovery claims under CERCLA § 107(a), and that the Act limits potentially liable parties to claims for contribution governed by CERCLA § 113(f). The Ninth Circuit issued an opinion and entered judgment on July 2, 1997. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997).[2]

On July 15, 1997, Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on August 11, 1997. Petitioners timely filed this Petition for a Writ of Certiorari on November 10, 1997.

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[2] Indeed, in a companion case, the court of appeals reversed another district court, which had reached a holding similar to that reached here. *See* Judgment Reversing Order of the District Court, *National R.R. Corp v. BPJ Int'l*, No. 95-5674 (9th Cir. filed July 9, 1997) (mem.).

REASONS FOR GRANTING WRIT

The purely legal question presented by this petition – who is entitled to use CERCLA § 107(a)'s cost recovery remedy – has been the focus of the most heated legal debate regarding CERCLA since this Court's decision three years ago in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). In *Key Tronic*, the Court addressed whether private parties who conduct environmental cleanups may recover attorneys' fees under the private cost recovery remedy created by CERCLA § 107(a). *Id.* at 811.[3]

The question presented here – which is related to, but far more fundamental than, the question addressed in *Key Tronic* – is whether potentially liable parties may invoke the private cost recovery remedy under § 107(a). As a threshold matter in *Key Tronic*, the Court necessarily addressed the issue now specifically raised here, and implicitly concluded that Key Tronic, a liable party, could pursue its "cost recovery claim under CERCLA § 107(a)(4)(B)." 511 U.S. at 812.

The Court's opinion, however, did not forestall controversy over the rights of potentially liable and liable parties who, like Key Tronic, conduct an environmental cleanup and avail themselves of CERCLA's private remedies. As the Fourth Circuit noted earlier this year in a vast understatement, "the ability of [potentially liable parties] to bring § 107 actions is the subject of considerable debate." *Beazer East, Inc. v. United States Navy*, No.

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[3] The Court held that the private cost recovery remedy under CERCLA § 107(a) enabled Key Tronic to recover its attorneys' fees directly related to its environmental cleanup efforts, including fees incurred in identifying other potentially liable parties from which to seek cleanup costs. *Id.* at 820.

96-17368, 1997 U.S. App. LEXIS 6746, *6 n.1 (4th Cir. Apr. 11, 1997).

To date, over sixty reported opinions from the lower federal courts address the question of whether a potentially liable party may use CERCLA § 107(a)'s private cost recovery remedy. Rather than developing any kind of consensus or uniform approach, however, these opinions have reached widely divergent conclusions and have merely fueled the controversy over the question presented.[4]

Echoing the very substantial concerns expressed in the case law, one commentator recently called the federal decisions on the question presented "muddled and conflicting." Michael V. Hernandez, *Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 Harv. Envtl. L. Rev. 83, 135 (1997).[5] "[P]rompt resolution of this issue is

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[4] Multiple courts have noted the existing conflict of authority regarding the issue described in the question presented. *See, e.g., Crofton Ventures Limited Partnership v. G & H Partnership*, No. MJG-96-1378, 1997 U.S. Dist. LEXIS 8067, *8 (D. Md. Jan. 31, 1997) (noting that "[f]ederal courts are divided" on this issue); *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1403 (D. Ariz. 1996) (describing this issue as "a hotly debated legal question"); *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 223 (E.D. Pa. 1995) (stating that "courts have reached different conclusions concerning when, if ever, a PRP has a right of action pursuant to § 107(a)").

[5] Another environmental commentator compared the federal courts' confusion with the parable of the "blind men and the elephant" – suggesting that courts have been blindly trying to define CERCLA § 107(a) by looking disjointedly at only discrete sub-issues. Ann Alexander, *Standing under Superfund §§ 107 and 113: Avoiding the Error of the Blind Men and the Elephant*, Toxics L. Rptr. (BNA) 155 (July 12, 1995) (analyzing the "firestorm" of litigation over the relationship between CERCLA §§ 107(a) and 113(f)).

vital," noted another observer, because the "almost ad hoc determination of a remediating plaintiff's rights has resulted in much unpredictability." Ivy Barton-Wagner, Comment, *Setting CERCLA Straight: A Solution to the Dispute over Actions by Liable Remediators Under 107 and 113*, 14 Temp. Envtl. L. & Tech. J. 207, 208 (1995).[6]

The Court should take this opportunity to resolve this confusion because, as long as this judicial contradiction reigns, the fundamental intent of Congress to promote settlement and cleanup under CERCLA will be frustrated. By addressing the question presented, this Court can provide much needed national guidance regarding the remedies that

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[6] There are numerous additional articles regarding the controversy over the question presented. *See, e.g.*, Daniel R. Avery, *Statutory Right or Statutory Prohibition? Reconciling CERCLA's Contribution Protection with the Private Response Cost Recovery Action*, 12 Va. Envtl. L.J. 367 (1993); Daniel D. Barnhizer, *Recent Development, Joint and Several Liability and Contribution Under CERCLA Sections 107(a)(4)(B) and 113(f)*, 18 Harv. Envtl. L. Rev. 563 (1994); Richard Buckley, Jr., Comment, *Making a Case for Statutory Amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Solving the Section 107/Section 113 Cause of Action Controversy*, 31 Tulsa L.J. 851 (1996); Steven DeGeorge, *Seventh Circuit Decisions Further Confuse the Availability and Significance of CERCLA § 107 Standing*, 9 Envtl. Litig. Comm. Newsl. (A.B.A. Sec. Litig., Chicago, Ill.) No. 1, at 5 (1997); Stephen Ferry, *Allocation and Uncertainty in the Age of Superfund: A Critique of the Redistribution of CERCLA Liability*, 3 N.Y.U. Envtl. L. J. 36 (1994); Aaron A. Garber, *The PRP, the Section 106 Administrative Order, the Contribution Claim, and CERCLA's Statute of Limitations: A Complete Statutory Analysis*, 16 Temp. Envtl. L. & Tech. J. 115 (1997); Mark A. Stach, *Only "Innocent" Parties Need Apply: The Death of Private Cost Recovery Actions Under Superfund?*, 20 Wm. & Mary Envtl. L. & Pol'y Rev. 33 (1995).

CERCLA provides to potentially liable and liable parties who conduct environmental cleanups.

The Court previously denied certiorari to decide this issue two years ago.[7] Since that time, however, these conflicts have not been resolved, but rather have expanded to multiple conflicting circuit views, as explained below. Beyond question, the conflicts will not resolve themselves without guidance from this Court. Based on facts presumed to be true – with all relevant dispositive factual elements present – this case presents the ideal opportunity to resolve this now mature controversy.

A. The Court Should Issue Certiorari to Resolve Conflicts of Authority Regarding the Availability of CERCLA § 107(a)'s Cost Recovery Remedy for Potentially Liable Parties Who Conduct Environmental Cleanups.

Resolving this conflict is critical because CERCLA is one of the Nation's most important civil liability laws, whether measured by public expectations, its far-reaching effects on commercial relationships in the United States, or its sheer monetary impact.[8] Congress's "primary objective" in adopting CERCLA was to promote "spontaneous private cleanup initiatives." *In re Hemingway Transp., Inc.*, 993 F.2d 915, 921 (1st Cir. 1993).

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[7] In *United Technologies Corp. v. Browning-Ferris Industries, Inc.* 33 F.3d 96, 103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995), the First Circuit held that potentially liable parties cannot bring private cost recovery claims under § 107(a), but rather must rely on their express contribution remedy in CERCLA § 113(f).

[8] The total liability imposed under CERCLA has already run into the billions of dollars. *See* U.S. General Accounting Office, *Superfund – EPA Has Opportunities to Increase Recoveries of Costs*, GAO/RCED-94-196 (September 1994) at 18.

Indeed, to ensure that private parties, rather than the government, conduct and pay for environmental cleanups, Congress established § 107 to permit parties who cleanup contaminated sites to recover the costs of that cleanup from parties who are liable under CERCLA's strict liability scheme. *See Price v. United States Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994) (explaining that CERCLA's private action for recovery of response costs is one of the mechanisms Congress created to achieve its purpose of promoting private environmental cleanups).

CERCLA 107(a) provides that parties who either participated in the creation of an environmental pollution problem, or have some legal responsibility for the property where the problem exists, are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(1-4)(A). CERCLA also provides that responsible parties are liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(1-4)(B).

Courts have generally considered CERCLA § 107(a) to impose joint-and-several liability, though this phrase is not used in the statute nor even necessary to it. Rather, under the express statutory language, recovery is available *without limitation* for "costs of response." *See United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995) (noting that the description, " '[a]ctions for recovery of costs,' suggests full recovery"). Congress also provided for only strictly circumscribed defenses, not including contributory conduct. *See* 42 U.S.C. § 9607(b) (1994).

By amendment in 1986, Congress established that anyone found liable for another's response costs under

CERCLA could seek contribution, subject to certain powerful limitations. *See* 42 U.S.C. § 9613(f)(2). As a result, Petitioners urge and the plain language provides that a liable CERCLA defendant must pay all the plaintiff's response costs, but then may seek to recover a portion of them from others, including a liable plaintiff, by prosecuting contribution counterclaims, cross-claims, or third-party claims.

In *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), this Court examined the relationship between the original private cost recovery remedy created by CERCLA § 107(a) and the newly added express contribution remedy codified as CERCLA § 113(f). As the Court explained, § 113(f) merely added a new and "somewhat overlapping" express contribution remedy to the Act's liability scheme:

> The 1986 [SARA] amendments included a provision – CERCLA § 113(f) – that expressly created a cause of action for contribution. *See* 42 U.S.C. § 9613(f). Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action under § 107 by presupposing that such an action existed. An amendment to § 107 itself, for example, refers to "amounts recoverable in an action under this section." 42 U.S.C. § 9607(a)(4)(D). The new contribution section also contains a reference to a "civil action . . . under section 107(a)." 42 U.S.C. § 9613(f)(1). *Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.*

Id. at 816. (emphasis added).

Notwithstanding the Court's explanation, a plethora of judicial opinions since *Key Tronic* has generated multiple inconsistent and irreconcilable constructions of CERCLA's cost recovery and contribution remedies. As a result, the substantive and procedural elements of a private citizen's remedies under CERCLA differ significantly from jurisdiction to jurisdiction.

1. Conflicts Exist Regarding the Fundamental Nature of CERCLA § 107(a) and § 113(f) Among the Circuits That Limit the Availability of CERCLA § 107's Private Cost Recovery Remedy.

The United States District Court for the District of Arizona held in this case that CERCLA § 107(a) "clearly and unequivocally" creates a private cost recovery remedy that, by CERCLA's "plain language," may be used by "any . . . person" – including a potentially liable person – who incurs costs in properly conducting an environmental cleanup. *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1405 (D. Ariz. 1996).

The Ninth Circuit, however, rejected the district court's plain language construction of CERCLA § 107(a)'s private cost recovery remedy and ordered the dismissal of Petitioners' cost recovery claims under § 107(a). *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997). The court of appeals held that Petitioners, as potentially liable parties under CERCLA, may bring only claims governed by the express contribution remedy in CERCLA § 113(f). *Id.*

At first blush, the Ninth Circuit's decision appears merely to fall in line with decisions from the First, Third,

Seventh, Tenth and Eleventh Circuits, which have explicitly rejected the plain language construction of CERCLA § 107(a).[9]

On prudent analysis, however, substantial conflicts are revealed even among the decisions in these circuits. As discussed below, there is a conflict between the plain language construction and all of the multiple competing constructions, as well as conflicts among the competing constructions themselves. Moreover, the opinions devising the competing constructions have led to textbook examples of the inevitable confusion that results from loose statutory construction.

a) A Conflict Exists Between the Dichotomous Construction of CERCLA § 107(a) and § 113(f) Adopted by Some Circuits and the Overlapping Construction Adopted by Other Circuits.

Among the circuits that reject the plain language construction, a fundamental conflict of authority exists regarding the relationship between CERCLA § 107(a) and § 113. As explained in the next section, all these conflicts are unnecessary; none occurs under the plain language construction. Yet, once courts depart from the plain language construction, confusion and conflict abound.

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[9] The United States Court of Appeals for the Fifth Circuit acknowledged that the "text of section 107 does not limit the class of plaintiffs who may recover response cost," and that the language of section 107 "evidences congressional intent that anyone is eligible to recover response costs." *OHM Remediation Serv. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1579 (5th Cir. 1997). The court, however, "express[ed] no opinion on the separate question . . . [of] whether a PRP may seek to hold other parties jointly and severally liable under section 107(a) for response costs." *Id.* at 1582 n.1.

The Ninth Circuit in this case stated that "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (1997). In contrast, the First Circuit has described the remedies under CERCLA § 107(a) and 113(f) as "distinct, non-overlapping anodynes." *See United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995).

Thus, while the Ninth Circuit's description implies that the boundaries of § 107(a) and § 113(f) are blurred and overlap, the First Circuit's description holds that they are fixed, and that the remedies are wholly separate. These conceptual differences regarding the relationship between § 107(a) and § 113(f) are not merely academic. Rather, they affect the rights of potentially liable parties directly in important and concrete ways.

Under the First Circuit's dichotomous statutory construction, the cost recovery remedy under CERCLA § 107(a) and the contribution remedy under § 113(f) are distinct. *See United Techs. Corp.*, 33 F.3d at 100. Only non-liable parties – or, in the parlance of the First Circuit, "innocent" parties – may use § 107(a)'s cost recovery remedy. *See id.* at 99. Consequently, all potentially liable parties are relegated to the separate contribution remedy in CERCLA § 113(f). *See id.*

Importantly, the First Circuit's interpretation of CERCLA § 113(g)'s provisions, which establishes CERCLA's statutes of limitations, clearly reflects the court's construction of CERCLA § 107(a) and § 113(f) as creating two non-overlapping remedies. Section 113(g) sets forth two sets of statutes of limitations. Section 113(g)(2) establishes a six-year statute of limitations for "[a]ctions for recovery of costs" incurred in a remedial

action. 42 U.S.C. § 9613(g)(2) (1994).[10] Section 113(g)(3), in contrast, establishes a three-year statute of limitations for actions for contribution. *See* 42 U.S.C. § 9613(g)(3) (1994).

Based on the parallel limitations provisions in CERCLA § 113(g) and on the court's notion of completely separate remedies, the First Circuit held that "the shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties." *United Techs. Corp.*, 33 F.3d at 99. On the other hand, according to the First Circuit, "the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups." *Id.*

In contrast to the First Circuit's rigidly dichotomous construction, an overlapping construction of the relationship between §§ 107(a) and 113(f) has enabled other courts to apply the CERCLA § 113(g) limitations periods in a wholly different manner. Illustratively, in *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192-93 (10th Cir. 1997), the court of appeals reversed an order that applied the three-year statute of limitations to a potentially liable party's CERCLA claim.

Like the Ninth Circuit in this case, the Tenth Circuit concluded that a potentially liable party's contribution claim arises under § 107(a), but is governed by § 113(f). *Sun Co.*, 124 F.3d at 1191. Accordingly, the Tenth Circuit in *Sun Co.* reasoned that the six-year limitations period in CERCLA § 113(g)(3) applies to an initial claim to seek recovery of costs, even if § 113(f) otherwise governs that claim because it is brought by a potentially liable party.

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[10] Section 113(g)(2) also provides for a three-year limitations period for removal actions, unless a remedial action is initiated within three years of the removal action, in which case the costs for the removal action can be sought within six years. *See* 42 U.S.C. § 9613(g)(2).

See id. at 1192. The foregoing comparisons starkly reveal that similarly situated parties may face different limitations periods governing their CERCLA claims, depending solely on which jurisdiction's statutory construction applies.

The conflict of authority regarding the relationship between CERCLA § 107(a) and § 113(f) directly affects other statutory provisions as well. CERCLA § 113(f)(2), for example, provides that a party that has resolved its liability to the government receives contribution protection regarding the matters addressed in a qualified settlement. *See* 42 U.S.C. § 9613(f)(2). Under a dichotomous statutory construction, no potentially liable party can have any claim under CERCLA § 107(a). Therefore, no such party can allege a claim under § 107(a) to evade a settling party's contribution protection under § 113(f)(2).

The Third Circuit subscribed to exactly this reasoning in endorsing a dichotomous statutory construction of CERCLA § 107(a) and § 113(f). The Third Circuit stated that allowing a potentially liable party to "seek contribution under § 107(a)(4)(B) . . . would throw the proverbial monkey wrench into the" contribution protection mechanism. *In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997). The Third Circuit's *In re Reading Co.* opinion prompted the Tenth Circuit, which views all CERCLA contribution claims as arising under § 107(a), openly to acknowledge the rift between the circuits' conflicting interpretations. The Tenth Circuit bluntly stated: "[W]e believe the Third Circuit's concern reflects a misconception of the relationship between §§ 107 and 113." *Sun Co.*, 124 F.3d at 1193.

The conflicts of authority among the circuits also affect whether potentially liable parties may be entitled to certain forms of relief available for claims under § 107(a). CERCLA § 113(g)(2) authorizes declaratory relief in

actions under CERCLA § 107(a), and § 107(a) itself authorizes awards of prejudgment interest for actions under that section. *See* 42 U.S.C. §§ 9613(g)(2), 9607(a). Yet, absent clear guidance regarding the proper interpretation of § 107(a) and § 113(f), the availability of these forms of relief to potentially liable parties will remain problematical.[11]

b) The Seventh Circuit's Fault-Based Construction of CERCLA § 107(a)'s Private Cost Recovery Remedy Conflicts with Other Circuits' Constructions That Disregard Fault.

Uniquely among the circuits, the United States Court of Appeals for the Seventh Circuit has engrafted a fault-based test onto the construction of CERCLA § 107(a)'s private cost recovery remedy.[12] *See Rumpke of Ind., Inc. v.*

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[11] Given that a liable party's contribution claim cannot be pursued under CERCLA § 107(a) in some circuits, the prejudgment interest authorized for claims brought pursuant to § 107(a) presumably is unavailable to liable parties in the jurisdictions subscribing to the dichotomous construction of § 107(a) and § 113(f). Similarly, the declaratory relief that is specifically authorized for cost recovery actions may not be available in those jurisdictions. *See, e.g., Reichhold Chem. Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1124 (N.D. Fla. 1995) (holding that the liable party was limited to the remedy in § 113(f) and was not entitled to declaratory relief because "[b]y its explicit language, [113(g)(2)] applies only to cost recovery actions under § 107").

[12] In creating this fault-based test, the court inexplicably has failed to address the conflict between recent decisions and the court's opinion in *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994). In *Amcast*, Chief Judge Posner stated that the "statute is clear that whoever

Cummins Engine Co., 107 F.3d 1235 (7th Cir. 1997). This fault-based test opens yet another split of authority among the circuits regarding who may use CERCLA § 107(a)'s cost recovery remedy. Again, as explained in the next section, such a conflict is avoided under the plain language construction.

The Seventh Circuit has explicitly disagreed with other courts' interpretations of CERCLA that limit § 107(a)'s cost recovery remedy to only "truly innocent" private plaintiffs. *Id.* at 1241. Under the Seventh Circuit's fault-based test, a potentially liable party may use § 107(a)'s cost recovery remedy, but only if the party alleges that it is "blameless" of actual fault for polluting the cleanup site. *See id.* at 1240.

According to *Rumpke*, under CERCLA's strict liability scheme, a party can be liable but "blameless" if, for example, the party purchased contaminated property either knowingly or without making due inquiry. The Seventh Circuit held that liable landowners "who allege that they did not pollute the site in any way may sue for their direct response costs under § 107(a)." *Id.* at 1241.

The Seventh Circuit expressed its fear that, absent such an exception for "blameless but liable" parties, the CERCLA § 107(a) private cost recovery remedy would be eviscerated. *Id.* The court warned, "[i]f one were to read § 107(a) as implicitly denying standing to sue even to

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(like Amcast [the plaintiff]) incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person, and if the responsible person believes as [the defendant] does that his contribution to the mess was trivial and wants the point established promptly he can counterclaim for as large a percentage of the costs as he thinks he can prove was due to the plaintiff's own conduct." *Id.* at 748.

landowners like Rumpke who did not create the hazardous conditions, this would come perilously close to reading § 107(a) itself out of the statute." *Id.*

It is unclear what degree of blameworthy conduct is necessary under the Seventh Circuit's construction to foreclose a potentially liable party from bringing a cost recovery claim under CERCLA § 107(a). Of course, the strict liability statute is silent on the issue. In *AM International, Inc. v. Datacard Corp.*, 106 F.3d 1342 (7th Cir. 1997), the plaintiffs were liable parties under CERCLA because they owned the contaminated property. Although the plaintiffs alleged that they were not at fault for the contamination, they bought the property knowing about the contamination and presumably had paid less because of it. *Id.* at 1347. The court conceded that "this may have rendered [the plaintiffs] a little less 'innocent,' " but nonetheless allowed the plaintiffs to invoke the cost recovery remedy in § 107(a). *Id.*

The Tenth Circuit has specifically criticized the type of procedural mechanics implicit in the Seventh Circuit's construction, which enables the plaintiffs to determine whether the claim falls under § 107(a) or § 113(f) based on their mere allegation of blamelessness. *See Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193 (10th Cir. 1997). Implicitly acknowledging a circuit split, the Tenth Circuit observed that "our construction of the statute does not divide contribution actions into § 113 actions and § 107 actions depending on the procedural posture of the plaintiff [potentially liable party]." *Id.*

By declining to address the soundness of the Seventh Circuit's fault-based construction and by dismissing the impact of its own construction on critical elements of a potentially liable party's remedy, the Ninth Circuit failed to recognize the fundamental nature of its misconstruction and the conflict it perpetuated.

2. The Foregoing Conflicts Do Not Exist Among the Courts that Adhere to the Plain Language Construction of CERCLA § 107(a) That Allows "Any Person" Who Conducts a Cleanup to Use the Section's Cost Recovery Remedy.

Consistent with the statutory text, the district court in this case construed CERCLA § 107(a) as allowing the government and literally "any other person" to invoke the section's cost recovery remedy to seek reimbursement for their qualified cleanup costs. *See Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1406 (1996). Given the clear statutory text, the court refused "to engraft the word 'innocent' onto the phrase 'any . . . person' set forth in Section 107(a)(4)(B)." *Id.* at 1407.

In reaching this conclusion, the district court joined numerous other courts around the country that have adopted this plain language construction of CERCLA § 107(a). The district court in this case explained that such a plain language construction of CERCLA § 107(a) not only conforms to the statutory text, but also directly furthers its congressional purpose. *See id.* (stating that its decision "is supported by an analysis of CERCLA policy and case law").

The plain text of CERCLA § 107(a) does not distinguish between liable and non-liable parties. *See* 42 U.S.C. § 9607(a). The only distinction in the text of § 107(a) is between sovereign governments and all other plaintiffs: Under CERCLA 107(a)'s cost recovery remedy, the government plaintiffs receive a presumption that their expenditures are spent in compliance with the applicable federal regulations establishing approved cleanup procedures. All other CERCLA plaintiffs must actually prove such compliance. *Compare* 42 U.S.C. § 9607(a)(1-4)(A) *with* § 9607(a)(1-4)(B).

Critically, omission of any language limiting who is entitled to the CERCLA § 107(a)'s private cost recovery remedy should be viewed as deliberate. When Congress intended to limit a private remedy in CERCLA to non-liable persons, Congress did so expressly. Illustratively, CERCLA § 106 creates a private remedy for parties who conduct cleanups pursuant to an EPA order. This remedy allows such parties to recover their cleanup costs from the "Superfund," the federal trust fund established by CERCLA to pay for hazardous waste cleanups. *See* 42 U.S.C. § 9606(b)(2)(C).

Congress, however, expressly limited this cost recovery remedy to any person who can "establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a)." *See id.* In direct contrast, Congress did not draft language that limits the parties entitled to the cost recovery remedy in § 107. This fact suggests that Congress intended that literally "any person" who conducts a proper cleanup is entitled to that remedy.

Unlike the district court the Ninth Circuit disregarded the plain language. The court of appeals should not have done so because, as this Court recently reaffirmed, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, No. 97-7185, 1997 U.S. LEXIS 6704, *13 (Nov. 4, 1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

A plain language construction of CERCLA § 107(a)'s text is straightforward and powerful, and it provides a number of legal incentives for potentially liable parties to act to meet CERCLA's objectives. Indeed, the practical implications of the plain language construction of

§ 107(a) are critical, shifting tremendous risks to those parties who are liable but who do not perform cleanups. As the district court stated:

> [A]llowing [potentially liable parties] to proceed under Section 107 creates several incentives for early cleanup and settlement. These incentives include: (1) shifting the difficult burden of proof concerning the allocation of cleanup costs from plaintiffs to defendants; (2) relieving plaintiffs of the risk of being held liable for "orphan shares" . . . (3) minimizing plaintiffs' transactions costs involved in tracking down and suing every [potentially liable party]; (4) limiting the range of available defenses to those enumerated in Section 107(b); and (5) giving parties who initiate cleanups the benefit of a longer statute of limitations.

Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400, 1407-08 (D. Ariz. 1996).

The district court's opinion explained clearly how a plain language construction of CERCLA § 107(a) effectuates the congressional purposes behind the Act and avoids problems resulting from competing constructions. *Id.* at 1407-09. Not surprisingly, therefore, recent decisions from other jurisdictions have endorsed that opinion, finding it persuasive and "particularly well-reasoned." *E.g., Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1243 (M.D. Pa. 1996) (citing *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Ariz. 1996)).

Those courts that adhere to a plain language construction that interprets the words "any person" in CERCLA § 107(a) literally have acted consistently with this Court's interpretations of similar provisions in other federal environmental statutes. For example, in *Bennett v.*

Spear, 117 S. Ct. 1154, 1162 (1997), the Court stated that in the absence of explicit congressional language limiting or qualifying the phrase "any person," it should be taken readily at "face value."

Considerable authority supports the plain language construction, though the apposite circuit authority is not always explicit. A clear majority of decisions from within the Fourth Circuit have endorsed the plain language construction of CERCLA § 107(a).[13] Against this backdrop,

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[13] In *United States v. Taylor*, 909 F. Supp. 355, 364 (M.D.N.C. 1995), the court held that a PRP need not be "an innocent or noble volunteer" to state a cost recovery claim under CERCLA § 107(a). *Id.* (quoting *Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp 1269, 1272 (E.D. Va. 1992)). The court concluded that restricting CERCLA § 107(a)'s cost recovery remedy "ignores the plain language of the statute," and "would require a party to prove its innocence before utilizing Section 107, an extraordinary burden to place on a plaintiff." *Id.* at 363. Likewise, in *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 921 F. Supp. 336, 347 (E.D. Va. 1996), the district court joined the majority of district courts in the Fourth Circuit in adhering to the plain language construction of CERCLA 107(a)'s private cost recovery remedy. The court noted that "[n]othing on the face of the statute indicates" that a liable party "is liable under § 107 only to the United States, a state, an Indian tribe, or any other *'innocent'* person." *Id.* (emphasis added). Recently, another district court in the Fourth Circuit specifically cited the district court's opinion in this case and rejected the contention that the "phrase 'any other person' [in CERCLA § 107(a)] should be read to mean 'any other innocent person.' " *Crofton Ventures Ltd. Partnership v. G & H Partnership*, No. MJG-96-1378, 1997 U.S. Dist. LEXIS 8067, *10 (D. Md. Jan. 31, 1997). The court explained, "As the *Pinal Creek* court noted, prohibiting PRPs from bringing cost recovery actions under § 107 'would turn the CERCLA incentive scheme on its head.' " *Id.* at *12 (quoting *Adhesives Research Inc. v. American Inks & Coatings*, 931 F. Supp. 1231, 1244 (D. Pa. 1996) citing *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1408 (D. Ariz. 1996)).

the United States Court of Appeals for the Fourth Circuit has not revisited the issue since its earlier cases allowing potentially liable parties to use the cost recovery remedy under § 107(a). *See, e.g., Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 901 F.2d 1206 (4th Cir. 1990).[14] Under the circumstances, one district court expressly "predict[ed] that the Fourth Circuit would decline to follow those cases which hold that a PRP may never utilize Section 107." *United States v. Taylor*, 909 F. Supp. 355, 366 (M.D.N.C. 1995).[15]

In using a plain construction of § 107, district courts in the Sixth Circuit have been guided by the court of appeals' decision in *Velsicol Chemical Corp. v. Enenco, Inc.*,

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[14] The Fourth Circuit recently assumed *arguendo* that a potentially liable party can maintain an action under § 107, but observed "that the ability of PRPs to bring § 107, actions is the subject of considerable debate." *See Beazer East, Inc. v. United States Navy*, No. 96-1736, 1997 U.S. App. LEXIS 6746, *5-6, 6 n.1 (4th Cir. Apr. 11, 1997).

[15] Similarly, in *Barmet Aluminum Corp. v. Brantley & Sons, Inc.*, 914 F. Supp. 159, 164 (W.D. Ky. 1995), the district court held "that a liable, or potentially liable party, such as Plaintiff is alleged to be, is not limited to a contribution action under [113], but may also bring an action to recover its response costs under [107]." Likewise, in *Mead Corp. v. United States*, No. C-2-92-326, 1994 U.S. Dist. LEXIS 1426, *26 (S.D. Ohio Jan. 14, 1994), the court concluded that "there is nothing in the statute to indicate that a [potentially liable party] cannot initiate an action under section 107." Another court reached the same conclusion in *Kelly v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990).

9 F.3d 524 (6th Cir. 1993).[16] In *Velsicol*, the United States Court of Appeals for the Sixth Circuit allowed a potentially liable party to proceed with a cost recovery claim under CERCLA § 107(a). *See id.* at 531 (reviewing issue regarding statute of limitations). By recognizing the right of potentially liable parties to invoke the cost recovery remedy created by CERCLA § 107(a), the foregoing jurisdictions have perpetuated a clear conflict among the federal courts regarding the question presented. Prior circuit decisions in the Fourth and Sixth Circuits, as well as this Court's holding in *Key Tronic*, have guided district courts in those circuits to permit potentially liable parties to invoke CERCLA § 107(a) cost recovery remedy. In light of the plain statutory language of CERCLA § 107(a), this result should not be surprising.

By adhering to a plain language construction of CERCLA § 107(a)'s cost recovery remedy, courts in the

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[16] Appellate decisions in the Second and Sixth Circuits support the district court decisions in those jurisdictions that endorse the plain language construction of CERCLA § 107(a). For example, in *Idylwoods Associates v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1313 (W.D.N.Y. 1996), held that if Congress "wished to require a PRP to utilize only § 113 in seeking reimbursement of response costs, it could easily have said so." The district court's opinion is supported by a decision of the Second Circuit wherein the court of appeals held that under CERCLA § 107(a)(4)(B) " 'any . . . person' who is acting consistently with the requirements of the NCP may recover 'necessary costs of response.' " *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041-42 (2d Cir. 1985). Similarly, the court in *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332, 337-38 (W.D. Mich. 1995), explained that "[t]he decision to permit [potentially liable parties] to proceed with their action under CERCLA § 107, instead of forcing the action to be amended to be one for contribution under section 113, appears to be more consistent with the Sixth Circuit and Supreme Court opinions."

Second, Fourth, and Sixth Circuits have avoided the labyrinthine conflicts that have resulted from other courts' departure from the straightforward interpretation of the section. The Court should resolve these conflicts by granting this writ to reverse the Ninth Circuit and adopt the plain language construction of CERCLA § 107(a).

B. The Court Should Grant this Petition to Resolve the Conflicts of Authority Because the Existing Legal Uncertainty Frustrates the Congressional Purposes Behind The Act.

The Court should grant this petition to protect fundamental goals behind CERCLA that have been frustrated by conflicts over the question presented in this case. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 1986 U.S.C.C.A.N. (100 Stat.) 1613 (1988) to address the prevailing concern that too much money was being spent litigating CERCLA claims rather being devoted to cleanups. Echoing a now familiar concern, one Senator expressed his exasperation by suggesting that instead of "Superfund," CERCLA should be called "the lawyers' slush fund." 131 CONG. REC. S11658 (daily ed. Sept. 18, 1985) (statement of Sen. Symms).

Given the currently fractured state of the law, potentially liable private parties face tremendous legal uncertainty regarding the availability of CERCLA § 107(a) as a remedy by which they can recover their cleanup costs. Absent a clear remedy with predictable effectiveness, business judgment aggressively counsels against voluntarily undertaking what one court described as the "astronomical sums needed to restore [polluted] sites." *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1236 (7th Cir. 1997). Faced with uncertain prospects

for recovery and unpredictable legal risks, many potentially liable parties instead will direct their resources toward litigation to limit liability rather than voluntarily initiating cleanups.

Whenever potentially liable parties hesitate in initiating environmental cleanups, CERCLA's goals have been frustrated. Encouraging prompt private cleanups is crucial to CERCLA because the Superfund cannot cover more than a fraction of the costs of cleaning the nation's most heavily polluted sites. As stated in CERCLA's legislative history, "[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem." H.R. Rep. No. 99-253, pt. 5, at 58 (1985) (letter from U.S. Reps. Augustus Hawkins and Joseph Gaydos).

The need for private cleanups extends even more urgently to state and local cleanup programs that rely on CERCLA. In the State of Arizona's amicus brief in support of Petitioners in the district court, the Attorney General of Arizona explained: "The State has a vital interest in this issue because the State must rely on the willingness of private parties to conduct remediation of contaminated sites. The State does not have a fund of $5 billion like the Environmental Protection Agency." (Joinder of the State of Arizona to the Memorandum of *Amicus Curiae* City of Phoenix at 1.) Similarly, the City of Phoenix warned, "unless liable parties continue to undertake prompt remediation themselves, the system will grind to a halt." (Memorandum of *Amicus Curiae* City of Phoenix Regarding Cost Recovery Under CERCLA at 3).

Recovering costs of conducting these cleanups, however, presents onerous evidentiary burdens at most sites. As EPA explained to Congress:

> Site records are frequently deficient. It is often difficult to determine with any certainty who sent wastes to the site, what the wastes were

> and in what quantities, and where they were placed. Dozens and even hundreds of parties may have been involved.

Superfund Reauthorization: Judicial and Legal Issues: Oversight Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the Comm. on the Judiciary, 99th Cong. 14 (1985) (statement of Mr. Lee Thomas, Administrator of EPA).

By initially allowing the parties conducting the cleanup to collect a full recovery from any defendant, CERCLA § 107(a)'s cost recovery remedy mitigates these evidentiary burdens. In a private cost recovery action, the non-working defendants will have the burden of tracking down and allocating the cleanup costs among all liable parties through claims under CERCLA § 113(f). *See Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1407-08 (D. Ariz. 1996). If a working party must rely on § 113(f) for a remedy, then the party conducting the cleanup will instead face these difficult burdens.

Without a doubt, the availability of the cost recovery remedy in CERCLA § 107(a) heavily influences the decisions of private parties weighing whether to conduct environmental cleanups. Potentially liable parties will weigh the evidentiary difficulties under CERCLA § 113 and estimate the overall degree of litigation risk before deciding whether to initiate a cleanup or sit back and wait and see if the government or another PRP will step forward to do the work.

Relegating all potentially liable parties to CERCLA § 113(f)'s remedy – the same remedy a party would have as a non-working defendant – dramatically increases the practical and legal risks that a potentially liable party assumes in conducting a cleanup. Thus, by restricting parties such as Petitioners to a contribution remedy

under § 113 on the ground that such parties render themselves liable when they commence a cleanup, the Ninth Circuit turned congressional intent on its head.

Resolution of the question presented in this petition, therefore, will have far-reaching consequences for the swiftness with which voluntary cleanups are begun, and for the demand on public funds needed to carry out cleanup actions where no one has stepped forward. Almost a generation after enactment, CERCLA's cleanup and settlement incentives languish amid conflicting authority. When the district court certified its order for an interlocutory appeal and the court of appeals granted review of that order, both courts recognized the importance of resolving the fundamental question of statutory interpretation presented in this petition. By granting this Petition for a Writ of Certiorari, this Court can resolve the unremitting national uncertainty regarding this critical issue.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit, and thereby resolve the conflicts of authority among the federal courts regarding the question presented herein.

Respectfully submitted,

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APPENDIX A

The PINAL CREEK GROUP, consisting of Cyprus Miami Mining Corporation, Inspiration Consolidated Copper Company, and Magma Copper Company, Plaintiff-Appellee,

v.

NEWMONT MINING CORP.; Occidental Petroleum Corporation; Canadianoxy Offshore Production Company; Atlantic Richfield Company; Phelps Dodge Corporation, Defendants-Appellants.

No. 96-16334.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Dec. 12, 1996.

Decided July 2, 1997.

Group composed of three mining companies engaged in voluntary cleanup of hazardous waste site brought action under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against other potentially responsible parties (PRPs), asserting claim for totality of its cleanup costs and seeking imposition of joint and several liability. Defendants moved to dismiss claim for joint and several liability. The United States District Court for the District of Arizona, Roslyn O. Silver, J., 926 F.Supp. 1400, denied motion but certified order for immediate interlocutory appeal. After granting petition for interlocutory review, the Court of Appeals, Tashima, Circuit Judge, held that: (1) CERCLA claim by one PRP against another PRP necessarily is one for contribution; (2) group was not entitled to recover, jointly and severally, totality of its response costs from other PRPs; and (3) under CERCLA, PRP does not have claim for

recovery of totality of its cleanup costs against other PRPs, and PRP cannot assert claim against other PRPs for joint and several liability.

Reversed and remanded.

Shane R. Swindle, Dalton, Gotto, Samson & Kilgard, Phoenix, AZ, for Newmount [sic] Min. Corp.

Michael D. Young, Tiffany Hedgpeth, McClintock, Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, Los Angeles, CA, for Phelps Dodge Corp.

Michael J. Gallagher, Davis, Graham & Stubbs, Denver, CO, for ARCO.

Michael P. Berman, Kim E. Williamson, Lowe & Berman, Phoenix, AZ, for Occidental Petroleum and Canadianoxy.

Nicholas J. Wallwork, Muchmore & Wallwork, Phoenix, AZ, for Plaintiff-Appellee.

Jeremy Heep, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, for amicus curiae United States.

Tamara L. Huddleston, Assistant Attorney General, Phoenix, AZ, for amicus curiae State of Arizona.

Craig J. Reece, Assistant City Attorney, Hugh H. Marthinsen, Squire, Sanders & Dempsey, Phoenix, AZ, for amicus curiae City of Phoenix, AZ.

Barbara R. Goldberg, Assistant City Attorney, Scottsdale, AZ, for amicus curiae City of Scottsdale, AZ.

Karen S. Gaylord, Assistant City Attorney, Tempe, AZ, for amicus curiae City of Tempe, AZ.

Appeal from the United States District Court for the District of Arizona; Roslyn O. Silver, District Judge, Presiding. D.C. No. CV-91-01764-ROS.

Before: GOODWIN, FERGUSON and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

This case requires us to decide whether the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), provides a party who is partly liable for the cleanup of a hazardous waste site with a claim against other potentially responsible parties ("PRPs") for the joint and several recovery of the totality of its cleanup costs. We answer in the negative.

I. BACKGROUND

"CERCLA was a response by Congress to the threat to public health and the environment posed by the widespread use and disposal of hazardous substances. Its purpose was to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir.1986).

Plaintiff is composed of three mining companies who have engaged in the voluntary cleanup of the Pinal Creek Drainage Basin, a hazardous waste site located in Arizona. In order to coordinate cleanup efforts, plaintiff companies formed the Pinal Creek Group (collectively, the "Pinal Group"). The Pinal Group commenced this

action in an effort to recover all (or, alternatively, some) of its cleanup costs from other PRPs.

Although the Pinal Group has admitted that it is partly responsible for a portion of these cleanup costs, it has asserted a claim for the totality of these costs and seeks to impose joint and several liability on defendants for that amount. The Pinal Group contends that defendants would then be entitled to assert a contribution claim against it (the Pinal Group) to recover that portion of the costs for which the Pinal Group would be responsible.

All defendants moved to dismiss the claim that sought to impose on them joint and several liability for all response costs incurred by the Pinal Group. The district court denied defendants' motion to dismiss. However, it certified its order for an immediate interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). We granted the petition for interlocutory review. Thus, we have jurisdiction under 28 U.S.C. § 1292(b), and we reverse.

II. DISCUSSION

A. Overview

The district court's interpretation of a statute is a question of law which we review *de novo*. *Parravano v. Babbitt*, 70 F.3d 539, 543 (9th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2546, 135 L.Ed.2d 1066 (1996). Our appellate jurisdiction under 28 U.S.C. § 1292(b) applies to the order certified to us and is not "tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, ___ U.S. ___, ___, 116 S.Ct. 619,

623, 133 L.Ed.2d 578 (1996). As the Seventh Circuit has stated, "it is the order that is before us on appeal, rather than the questions themselves." *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1239 (7th Cir.1997) (citing *Yamaha*).

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), authorizes suits against certain "statutorily defined 'responsible parties' to recover costs incurred in cleaning up hazardous waste disposal sites." *Mardan*, 804 F.2d at 1455. Under § 107, each such PRP[1] shall be liable for:

> (A) all costs . . . incurred by the United States Government or a State or an Indian tribe . . . [and]
>
> (B) any other necessary costs of response incurred by any other person. . . .

42 U.S.C. § 9607(a)(4)(A) & (B).

Because CERCLA originally did not explicitly recognize a claim for contribution, Congress amended it in 1986 to clarify and confirm that CERCLA did incorporate such a claim. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-18, 114 S.Ct. 1960, 1965-66, 128 L.Ed.2d 797 (1994); *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100-01 (1st Cir.1994). Section 113(f) was thus

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[1] Section 107(a) sets forth specifically who is a PRP liable under that provision. The Pinal Group concedes that its members are PRPs under § 107(a). Our use of the term PRP, and our opinion today, does not cover those "person[s] otherwise liable" under § 107(a) who can establish they are not liable by virtue of the defenses set forth in § 107(b). *See* 42 U.S.C. § 9607(b).

enacted, explicitly recognizing and regulating contribution claims under CERCLA.[2] The Pinal Group argues that, under § 107, it is entitled to recover, jointly and severally, the totality of its response costs from defendants (the "Newmont PRPs"). The Pinal Group relies on the language of § 107 which makes all PRPs liable for "any . . . necessary costs of response incurred by any other person." 42 U.S.C. § 9607(a)(4)(B).

The Newmont PRPs counter that, even if the Pinal Group is free to assert a claim under § 107, their liability

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[2] (1) Contribution

> Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)], during or following any civil action under section [106] or under section [107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] or section [107].

(2) Settlement

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(1) & (2).

to the Pinal Group would be for contribution under the combined effect of §§ 107 and 113. Accordingly, the Newmont PRPs argue that the liability of each of them would be several, and not joint, and would extend only to each party's own equitable share of the costs incurred by the Pinal Group. We agree.

Because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution. A PRP's contribution liability will correspond to that party's equitable share of the total liability and will not be joint and several.[3] CERCLA simply does not provide PRPs who incur cleanup costs with a claim for the joint and several recovery of those costs from other PRPs. As discussed below, our holding today is mandated by the text, structure, and legislative history of §§ 107 and 113, as well as by precedent.

B. Analysis

The text of § 107 leads to the conclusion that only a claim for contribution lies between PRPs. Under the literal language of § 107, the Pinal Group, as a PRP, is partly responsible for its cleanup costs and, as "any other person" under § 107, can also hold other PRPs liable for a portion of those same costs. This duality is best implemented by permitting a PRP who has incurred cleanup costs to assert only a contribution claim against other

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[3] We do not foreclose the possibility that a court could find, after balancing the equities as required by § 113, that a particular PRP's equitable share of the total liability should be zero.

PRPs. Viewed in that way, the Pinal Group is responsible only for that portion of the liability which it equitably should bear anyway, while being entitled to hold other PRPs severally liable for each of their, respective, equitable shares of the total costs. That is the essence of a claim for contribution which, albeit implicitly, is imbedded in the text of § 107.

This conclusion – that § 107 implicitly incorporates a claim for contribution – is unremarkable; most courts had so held even before Congress settled the issue by enacting § 113(f). *Key Tronic*, 511 U.S. at 809, 814-15 & 816 n. 7, 114 S.Ct. at 1960, 1965 & 1965 n. 7 (recognizing that "numerous cases" interpreted § 107 "to impliedly authorize such a cause of action"); *United Tech.*, 33 F.3d at 100 (same); *Mardan*, 804 F.2d at 1457 n. 3 (same).

The legislative history behind § 113(f) also supports the conclusion that, in enacting that provision, Congress was only confirming and clarifying an existing claim for contribution under § 107. H.R.Rep. No. 99-253, pt. 3, at 18-19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041 (section 113 "clarifies the availability of judicial review regarding contribution claims"); S.Rep. No. 99-11, at 43 (1985) (bill "clarifies and confirms existing law" by adding contribution provision); *see also United Tech.*, 33 F.3d at 100-01 (citing extensively to legislative history in support of same proposition).

Together, §§ 107 and 113 provide and regulate a PRP's right to claim contribution from other PRPs. *Key Tronic*, 511 U.S. at 814-18, 114 S.Ct. at 1965-66 (remedies in §§ 107 and 113 described as "similar and somewhat overlapping"). The contours and mechanics of this right are

now governed by § 113. Put another way, while § 107 created the right of contribution, the "machinery" of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107.

Two other circuits, as well as a number of district courts, have explicitly agreed with our conclusion that §§ 107 and 113 work together – the first section creating the claim for contribution between PRPs, and the second qualifying the nature of that claim. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir.1997) ("section 113 does not in itself create any new liabilities; rather, it confirms the right of a[PRP] under section 107 to obtain contribution from other [PRPs]"); *United Tech.*, 33 F.3d at 102 n. 10; *United States v. Bay Area Battery*, 895 F.Supp. 1524, 1533 (N.D.Fla.1995) ("section 113(f) qualifies the broad cause of action created in section 107(a)"); *Boeing Co. v. Cascade Corp.*, 920 F.Supp. 1121, 1132 (D.Or.1996) ("[u]nder CERCLA, where a responsible party brings a Section 107 action, Section 113 applies") (citing *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir.1991)). The relationship between the two sections has been aptly described, thusly:

> Section 113(f), however, does not create the right of contribution - rather the source of a contribution claim is section 107(a). Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.

United States v. ASARCO, Inc., 814 F.Supp. 951, 956 (D.Colo.1993) (citations omitted).

Our interpretation of the statute is also consistent with our own precedent, *Dant & Russell*. As relevant here, the teaching of *Dant & Russell* is that § 113 should be applied to claims brought by a PRP, whenever possible. 951 F.2d at 249. In that case, a PRP, Burlington Northern, asserted a claim against another PRP for all of the response costs it incurred in cleaning up a particular site. Burlington Northern argued that, because its claim was asserted under § 107, the court could not apportion liability, but instead had to grant it the totality of its response costs. *Id.* at 247 & 249. We expressly rejected that argument. *Id.* at 249. Instead, we treated Burlington Northern's claim as one for contribution and applied § 113(f) to it. *Id.* Accordingly, we upheld an award for approximately one-half of Burlington Northern's incurred cleanup costs. *Id.* In short, *Dant & Russell* forecloses a PRP from asserting a CERCLA claim for the totality of its response costs.

The Pinal Group attempts to distinguish *Dant & Russell* by first noting that only two PRPs were involved in that case. It then argues that *Dant & Russell* recognized a claim by a PRP for the totality of its costs under § 107 and then apportioned liability on the basis of an unasserted contribution counterclaim brought by the defendant PRP.

The argument does not find support in our opinion. Perhaps recognizing as much, the Pinal Group points to a footnote in Burlington Northern's reply brief in that case. In that footnote, Burlington Northern argued that we could only apportion liability by first recognizing its claim as one for the totality of its costs under § 107 and then relying on our "equitable power" to recognize an

"unasserted counterclaim in contribution" by the defendant PRP. However, by apportioning liability through the direct application of § 113(f) to Burlington Northern's purportedly-pure § 107 claim, we clearly chose not to rely on that rationale. In fact, the Pinal Group's citation of that footnote strengthens the argument, supported by the plain language of the opinion, that we consciously rejected Burlington Northern's (and the Pinal Group's) contention that a PRP is entitled to bring an action to recover all of its response costs under § 107.

The majority of courts faced with this issue, in contexts identical to the case at bench, have also concluded that a PRP is not entitled to recover all its response costs from other PRPs, but instead is limited to asserting a claim for contribution. *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F.Supp. 1354, 1362-65 (D.N.J.1996) (citing *Dant & Russell* and collecting other cases); *see, e.g., T H Agric. & Nutrition Co. v. Aceto Chem. Co.*, 884 F.Supp. 357, 360-362 (E.D.Cal.1995); *Kaufman v. Unisys Corp.*, 868 F.Supp. 1212, 1214-16 (N.D.Cal.1994); *Ciba-Geigy Corp. v. Sandoz Ltd.*, Civ. No. 92-4491, 1993 WL 668325 at *4-*7 (D.N.J. Jun.17, 1993); *see also Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F.Supp. 790, 798-801 (D.N.J.1996); *Boyce v. Bumb*, 944 F.Supp. 807 (N.D.Cal.1996).

As is the case traditionally in contribution actions between tortfeasors, CERCLA's claim for contribution creates several-only liability among PRPs. Accordingly, the Pinal Group is foreclosed from imposing joint and several liability on any of the Newmont PRPs, even with respect to any amount that may exceed the Pinal Group's own equitable share of the cleanup costs. A contrary

approach is not supported by CERCLA's text, is inconsistent with the traditional doctrine of contribution, entails a significant risk of producing unfair results, and runs the risk of creating procedural chaos.

The "joint and several" approach would be contrary to the statutory scheme created by CERCLA. If a group of defendant-PRPs is held jointly and severally liable for the total response costs incurred by a claimant-PRP, reduced by the amount of claimant-PRP's own share, those defendant-PRPs would end up absorbing all of the cost attributable to "orphan shares" – those shares attributable to PRPs who either are insolvent or cannot be located or identified. There is no statutory support for such a rule, which would immunize the claimant-PRP from the risk of orphan-share liability and would restrict substantially the ability of courts to apportion costs equitably pursuant to § 113(f). Immunizing PRPs who have directly paid for cleanup operations from the risk of sharing the cost associated with orphan shares would undermine the ability of courts to allocate costs between all PRPs "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1).[4] Under § 113(f)(1), the cost of

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[4] Of course, in equitably allocating responsibility between PRPs, courts are free to consider, together with other relevant factors, the fact that a PRP has itself engaged in cleanup efforts and the circumstances surrounding those efforts. 42 U.S.C. § 9613(f)(1); H.R.Rep. No. 99- 253, pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042 (in apportioning costs, courts may consider "the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment"); *Central Me. Power Co. v. F.J. O'Connor Co.*, 838 F.Supp. 641, 646-47 (D.Me.1993) ("degree of cooperation with government officials to prevent any harm to . . . the

orphan shares is distributed equitably among all PRPs, just as cleanup costs are.

Moreover, even a modified rule, in which the joint and several liability of defendant-PRPs is reduced by that portion of the orphan shares which the claimant-PRP should equitably bear, could result "in a chain reaction of multiple, and unnecessary lawsuits." *Ciba-Geigy*, 1993 WL 668325 at *7. Such a joint and several approach would "guarantee[ ] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case." *T H Agric.*, 884 F.Supp. at 361.

Our holding today is consistent with statements by the Supreme Court, and by five other circuits, recognizing in contexts similar to this one, that a CERCLA claim by a PRP against another PRP is necessarily for contribution. *Key Tronic*, 511 U.S. at 818 n. 11, 114 S.Ct. at 1966 n. 11 (implying that claim by a PRP under § 107 would be "for contribution against those treated as joint tortfeasors"); *United Tech.*, 33 F.3d at 99 n. 8 & 100 ("a party who himself is liable [can] only seek . . . contribution rather than complete indemnity"); *New Castle County*, 111 F.3d at 1120 (agreeing with "conclusion reached by [other] circuits" that an "action brought by a [PRP] is by necessity a section 113 action for contribution"); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir.1996); *United States v. Colorado &*

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environment" is a "very important" factor "in the contribution analysis").

E. R.R. Co., 50 F.3d 1530, 1536 (10th Cir.1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir.1989).[5]

In addition, three circuits have expressly rejected an argument nearly identical to the one advanced by the Pinal Group. In essence, those courts were faced with attempts by "working PRPs" to circumvent the contribution provisions of § 113.[6] As discussed in more detail below, in those cases, the working PRP asserted a claim to apportion costs between all PRPs. However, to avoid the effect of § 113, the working PRP asserted that its claim was not really a "contribution" claim controlled by § 113, but rather a "cost recovery" claim under § 107 which, as such, was not subject to the limiting provisions of § 113.

Likewise, the Pinal Group seeks to avoid the effect of § 113. By trying to obtain the totality of its costs immediately (subject to subsequent contribution counterclaims), it seeks to avoid the delay (and burden-of-proof rules) implicit in § 113(f)'s mechanism for the equitable allocation of costs among PRPs. In addition, by arguing

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[5] The Seventh Circuit has adopted an exception to the general rule that a PRP is limited to a contribution action under §§ 107 and 113, which excepts PRPs who have not polluted the site in any way. *Rumpke of Ind.*, 107 F.3d at 1241. Because the Pinal Group consists of parties who are admittedly partly responsible for the contamination at issue here, that exception would not apply to this case. We, therefore, do not reach that issue.

[6] A "working PRP" is a convenient label for a PRP that actually conducts cleanup operations, as opposed to one that reimburses a third party for the cost of the latter's cleanup efforts. The First Circuit has referred to costs incurred by a non-working PRP as "reimbursed costs" and to costs incurred by a working PRP as "first instance costs." *United Tech.*, 33 F.3d at 97.

for joint and several liability, the Pinal Group attempts to avoid bearing any part of the cost attributable to orphan shares; however, § 113(f) mandates the equitable allocation of all costs among PRPs, without establishing any special per se rules.

Both the Seventh and Tenth Circuits rejected a working PRP's attempt to avoid the effect of § 113(f)(2) by rejecting the argument that the PRP's claim was governed exclusively by § 107. *Colorado & E. R.R.*, 50 F.3d at 1534-36; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir.1994) (citing *Dant & Russell*). Section 113(f)(2) provides that a party who has settled with the government is immune from "contribution" suits regarding matters addressed in the settlement. 42 U.S.C. § 9613(f)(2). The working PRPs in *Colorado & E. R.R.* and *Akzo* tried unsuccessfully to hold liable a PRP who had settled with the government by arguing that § 113(f)(2) did not apply because their claim was for "cost recovery" under § 107, not for "contribution" under § 113(f). *Colorado & E. R.R.*, 50 F.3d at 1536; *Akzo*, 30 F.3d at 764.

Similarly, in *United Technologies*, 33 F.3d at 101-03, the First Circuit rejected a working PRP's attempt to avoid the statute of limitations that applies to contribution actions. Section 113(g)(3) establishes a three-year statute of limitations for "contribution" actions, while § 113(g)(2) generally establishes a six-year statute of limitations for "cost recovery" actions brought under § 107. 42 U.S.C. § 9613(g). The PRP in *United Technologies* argued that only claims seeking apportionment of reimbursed costs are "contribution" claims subject to the shorter period of § 113(g)(3) and that, since its claim sought apportionment

of first-instance costs, it really was asserting a cost recovery action subject to the longer limitation period of § 113(g)(2). As did the Seventh and Tenth Circuits, the First Circuit rejected this artificial distinction between working and non-working PRPs and applied the three-year statute of limitations to the working PRP's claim. *United Tech.*, 33 F.3d at 101-03.

Finally, we address three additional arguments advanced by the Pinal Group. First, it contends that our holding would hamper CERCLA's policy of promoting rapid and voluntary environmental responses by private parties to the threat posed by hazardous waste sites. We reject this argument because it is based on policy considerations which we cannot consider in light of the controlling text, structure, and logic of CERCLA and of our own precedent in *Dant & Russell*.

In any event, we are not convinced that the policy of promoting rapid voluntary cleanups would be undermined to any significant degree by our holding. As discussed above, courts may take into account the degree of cooperation shown by a PRP when equitably allocating liability among PRPs under § 113(f)(1). *See* 42 U.S.C. § 9613(f)(1); H.R.Rep. No. 99-253, pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042; *Central Me. Power*, 838 F.Supp. at 646-47 ("degree of cooperation" is a "very important" factor "in the contribution analysis"). In addition, other incentives exist for PRPs to conduct cleanup operations promptly. For example, a PRP who (like the Pinal Group) conducts business at a contaminated site would, by engaging in cleanup operations itself, protect its on-going operations and be better able to

control its cleanup costs, than if it waited for the government to intervene.

Second, the Pinal Group argues that our holding would result in the absence of a statute of limitations for a contribution action by a PRP who incurs response costs without governmental action in the form of a settlement, an order, a consent decree, or a judgment. The Pinal Group notes that § 113(g)(3) establishes a three-year limitations period for contribution actions, but that the provision uses as triggering dates events which would not occur when the cleanup proceeds without prior coercive government action. It then argues that the other limitations provision would not apply to such claims either because they are contribution claims and § 113(g)(2) applies only to the "recovery of costs referred to in section [107]." 42 U.S.C. § 9613(g)(2).

No statute of limitations issue is before us in this case and we decline the Pinal Group's invitation to opine on it indirectly. Suffice it to say that the federal courts are often faced with determining which statute of limitations governs claims created by Congress. *See, e.g., Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (borrowing analogous state statute of limitations for 42 U.S.C. § 1983 claim); *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (borrowing federal statute of limitations for claims of breach of collective bargaining agreement). The court directly faced with the issue must determine whether § 113(g)(3), § 113(g)(2), or some other statute should apply. *See United Tech.,* 33 F.3d at 99 n. 8 (expressing uncertainty as to which of the two periods would apply in this context). However, the need eventually to choose which statute of

limitations governs contribution claims certainly should not drive our interpretation of the substantive provisions of CERCLA.[7]

Third, the Pinal Group argues that, if not allowed to bring a "cost recovery" claim for the totality of its cleanup costs, it would be left with no claim to assert against the Newmont PRPs. The Pinal Group asserts it would not be entitled to assert a contribution claim under § 113(f) against the Newmont PRPs because it has not incurred any liability which would trigger such an action. Specifically, it contends that the requisite liability only attaches if the government incurs response costs, arguing that before then, no liability exists under § 107(a), and that the Pinal Group's status as a PRP, by itself, does not give rise to a claim for contribution.

We reject this argument because it is wrong as well as internally inconsistent. As the Newmont PRPs have conceded, the Pinal Group is entitled to assert a contribution claim here. Although it is true that PRP status, by itself, does not generate liability, the Pinal Group ignores the "necessary costs of response incurred by [it] consistent with the national contingency plan." 42 U.S.C. § 9607(a). Prior to its expenditure, the Pinal Group was not yet

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[7] We also note that the Pinal Group's argument is based on the incorrect premise that a contribution action is not brought under § 107. Thus, the choice presented by this premise, between a contribution action created and governed exclusively by § 113, on the one hand, and an independent "cost recovery action" available to working PRPs exclusively under § 107, on the other, is a false one. As we have concluded above, a PRP's contribution action finds implicit recognition in § 107; § 113 merely regulates its implementation.

liable because no one, not the government, not any other PRPs or any non-PRP private parties, had yet incurred any costs under § 107.

However, once the Pinal Group undertook those "necessary costs of response," it, along with all PRPs associated with the Pinal Creek site, became partly responsible for those costs.[8] This resulted in a situation where all PRPs, including the Pinal Group, bear some responsibility for those cleanup costs. Under § 107, the Pinal Group's responsibility for its own equitable share of the cleanup costs is generated independently of any liability that might arise from response costs incurred by the government. *Kaufman*, 868 F.Supp. at 1214-16 (contribution action recognized in circumstances identical to those present here); *Ciba-Geigy*, 1993 WL 668325 at *4-*7 (same); *Cf. United Tech.*, 33 F.3d at 99 n. 8 (suggesting that "a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution").

The argument also is inconsistent with the Pinal Group's own position that, after recovering its cleanup costs from the Newmont PRPs under § 107, the Newmont PRPs would have a contribution counterclaim against the Pinal Group under § 113(f). The Pinal Group fails to explain how contribution can lie in one direction, but not the other, or how it, while not liable before recovering

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[8] In admitting that the Newmont PRPs would have a contribution claim against it, should it be able to recover its entire cleanup costs, the Pinal Group acknowledges explicitly that it is partly responsible for the cleanup costs incurred by it.

from the Newmont PRPs, becomes liable after said recovery. By its nature, contribution only occurs between co-liable parties and flows in either direction, depending on which co-liable party has paid more than its fair share. Satisfaction of the cost recovery claim by the Newmont PRPs cannot make the Pinal Group liable (and thus subject to a contribution counterclaim) if it previously were not liable (and thus not able to assert a contribution claim).

Of course, this inconsistency disappears when it is recognized that the Pinal Group initially does have a contribution claim under §§ 107 and 113. *Kaufman*, 868 F.Supp. at 1214-16 (contribution action recognized in circumstances identical to those present in instant case); *Ciba-Geigy*, 1993 WL 668325 at *4-*7 (same).

III. CONCLUSION

Because a claim asserted by a PRP under § 107 requires the application of § 113, a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113. Therefore, we hold that, under CERCLA, a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability.

The judgment of the district court, denying defendants' motion to dismiss plaintiff's "First Claim for Relief," is therefore reversed, and the case is remanded

with instructions to grant that motion and for further proceedings consistent with this opinion.

REVERSED and REMANDED.[9]

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[9] The district court also denied a motion filed by some of the defendants for judgment on the pleadings as to plaintiff's First Claim for Relief. Because we conclude that this claim should have been dismissed, it is unnecessary to address the denial of the motion for judgment on the pleadings as to that claim.

APPENDIX B

The PINAL CREEK GROUP, consisting of Cyprus Miami Mining Corporation, Inspiration Consolidated Copper Company, and Magma Copper Company, Plaintiffs,

v.

NEWMONT MINING CORPORATION, et al., Defendants.

CIV-91-1764-PHX-ROS.

United States District Court,
D. Arizona.

March 27, 1996.

Potentially responsible parties (PRPs) under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) brought action against present and former owners or operators of mining facilities, seeking to recover under CERCLA and under state law expenditures involved in remediating groundwater contamination. On defense motions to dismiss and for judgment on pleadings, the District Court, Silver, J., held that: (1) PRPs had standing to bring claims under CERCLA's cost recovery provision, and were not limited to actions for contribution; (2) PRPs had standing to bring cost recovery claim under state statute providing that "any other person" in addition to state could bring action to recover remediation costs; and (3) corporate PRP was not inappropriately attempting to pierce its own corporate veil in connection with its claims against successor of corporation which once held interest in corporate PRP.

Motions denied.

Charles J. Muchmore, Nicholas J. Wallwork, Muchmore & Wallwork PC, Phoenix, AZ, for Pinal Creek Group.

Gerald S. Maltz, Miller Pitt & McAnally PC, Tucson, AZ, Shane Ray Swindle, Karl M. Tilleman, Dalton Gotto Samson & Kilgard PLC, Phoenix, AZ, Scott W. Rodgers, Osborn Maledon, PA, Phoenix, AZ, for Newmont Mining Corporation.

Michael P. Berman, John Dunning Titus, Lowe & Berman PA, Phoenix, AZ, for Occidental Petroleum Corp. and Canadianoxy Offshore Production Co.

Steven B. Weatherspoon, Chandler Tullar Udall & Redhair, Tucson, AZ, Michael John Gallagher, Davis Graham & Stubbs, Denver, CO, Sherry Marie Purdy, Atlantic Richfield Co., Denver, CO, for Atlantic Richfield Company.

John Marquette Rochefort, Patrick Ward Dennis, Michael David Young, Tiffany R. Hedgpeth, McClintock Weston Benshoof Rochefort Rubalcava & MacCuish, Los Angeles, CA, for Phelps Dodge Corp.

ORDER

SILVER, District Judge.

The Pinal Creek Group ("Plaintiffs") filed this action to recover expenditures involved in remediating groundwater contamination in the Pinal Creek drainage basin in Gila County, Arizona. Plaintiffs' Second Amended Complaint ("Complaint") contains three counts: Count I – cost recovery and declaratory relief pursuant to Section 107 of

the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607; Count II – cost recovery and declaratory relief under the Arizona Environmental Quality Act, A.R.S. § 49-285; and Count III – contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

The following motions are pending before the Court: Defendant ARCO's Motion to Dismiss Plaintiffs' Cost Recovery Claims,[1] Defendants Newmont Mining Corporation, Occidental Petroleum Corporation, and CanadianOxy Offshore Production Company's Motion for Judgment on the Pleadings as to Plaintiffs' Cost Recovery Claims, and Defendant ARCO's Motion to Dismiss Inspiration's Contribution Claim. Having considered the parties' briefs and oral arguments, the Court denies these motions.

Factual Background

The Pinal Creek drainage basin is located near the towns of Globe and Miami, Arizona. Mining and mineral processing activities have occurred in the Globe-Miami area since approximately 1883. These activities resulted in the production of hazardous substances, which have contaminated the groundwater in the shallow aquifer underlying Pinal Creek. Left unabated, the contaminated groundwater could reach the perennially flowing segment of Pinal Creek, and then the Salt River, and from

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[1] All other Defendants have joined ARCO's cost recovery motion.

there Roosevelt Lake, a major water source for residents of Maricopa County.

On May 8, 1989, the Director of the Arizona Department of Environmental Quality ("ADEQ") executed a Decision Record authorizing the use of monies from the Arizona Water Quality Assurance Revolving Fund "for purposes related to the investigation and remediation of the Pinal Creek site," in accordance with the Arizona Environmental Quality Act, A.R.S. §§ 49-281 to 49-287. The Decision Record states that this action was taken in response to "contamination of groundwater with acid mine drainage, containing acids and heavy metals, in the Pinal Creek Area."

On November 20, 1989, Plaintiff Cyprus Miami Mining Company ("Cyprus") provided ADEQ with a proposed interim Remedial Action Plan ("RAP") describing preliminary measures for responding to the contamination. ADEQ approved the RAP in May 1990.

On May 17, 1990, Cyprus entered into a "Group Agreement" with Plaintiffs Magma Copper Company and Inspiration Consolidated Copper Company, pursuant to which the "Pinal Creek Group" was formed and the individual group members agreed to share remediation costs. With the approval and under the oversight of ADEQ, Plaintiffs began implementing the RAP, incurring costs relating to sampling and analytical tests and services, time of Group personnel, costs of expert consultants, legal representation, identification of potentially responsible parties, investigation, and reimbursement of ADEQ for oversight costs. Plaintiffs have spent more than

$1 million.[2] They will continue to incur response costs, possibly running into the millions of dollars, arising out of the cleanup.

ADEQ has asked Defendants – who, like Plaintiffs, presently or in the past have owned or operated mining facilities in the Pinal Creek area – to participate in the cleanup and reimburse ADEQ for investigative and oversight costs. To date, Defendants have refused to participate in the cleanup or reimburse the state.

Plaintiffs filed this action on November 5, 1991. Defendants asserted contribution counterclaims pursuant to 42 U.S.C. 9613(f).

Governing Legal Principles

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all factual allegations in the complaint are taken as true and all reasonable inferences are drawn in the plaintiff's favor. *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir.1994). A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only if the plaintiff can prove no set of facts which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

Similarly, in considering a motion for judgment on the pleadings, all factual allegations in the nonmovant's

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[2] Plaintiffs allege that these costs were incurred in a manner consistent with the National Contingency Plan established by the United States Environmental Protection Agency ("EPA") pursuant to 42 U.S.C. § 9607(a)(4)(B), and consistent with the rules and procedures adopted by ADEQ under A.R.S. § 49-282(E).

pleadings are assumed to be true and all contravening assumptions in the movant's pleadings are taken to be false. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir.1989). Judgment on the pleadings is proper where the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.*

Standing to Assert Cost Recovery Claims

Defendants' cost recovery motions turn on the resolution of a hotly-debated legal question: May Plaintiffs, who are potentially responsible for groundwater contamination in the Pinal Creek basin, proceed under CERCLA's cost recovery provision, Section 107 (codified as 42 U.S.C. § 9607), or are they limited to an action for contribution pursuant to Section 113(f) (codified as 42 U.S.C. § 9613(f))?[3]

The resolution of this issue will have a significant impact on this litigation. Under Section 107, liability is

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[3] This issue is the subject of a pending appeal in the Ninth Circuit from a case in the Central District of California. *National American Railroad Passenger Corp. v. BPJ Int'l, et al.*, U.S. Court of Appeals Docket No. 95-56734, Lower Court Docket No. CV-92-2818-WMB. The Ninth Circuit scheduling order indicates that briefing will not be complete until May 1996. Presumably, a decision will not be rendered for several months thereafter. Plaintiffs and Defendants have urged the Court to resolve the issue now rather than await a decision from the Ninth Circuit. The parties argued, in part, that the Ninth Circuit's decision may not be controlling, because the facts of the instant dispute vary from those before the appellate court. Accordingly, the Court agreed to hear argument and rule on the motions.

joint and several, the range of possible defenses is sharply limited, and the statute of limitations is six years. In contrast, under Section 113(f), liability is several only, an array of equitable defenses are permitted, and the limitations period is three years.

To resolve the parties' dispute, the Court will first provide an overview of CERCLA's text and history. The Court will then summarize the parties' contentions and evaluate them according to CERCLA's text, policies and other important factors.

I. CERCLA Overview

CERCLA Section 107(a)(4)(A) provides a cause of action for the government and Indian tribes to recover costs incurred in responding to environmental contamination. Section 107(a)(4)(B) allows the recovery of "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan . . . " (Emphasis added.) The latter provision creates an implied cause of action for private parties to seek recovery of cleanup costs. *Key Tronic Corp. v. United States*, 511 U.S. 809, ___, 114 S.Ct. 1960, 1966, 128 L.Ed.2d 797 (1994).

A cost recovery action under either provision may be brought against any potentially responsible party ("PRP"), defined as a party falling into one of the following classes: (1) the owner and operator of the facility; (2) any person who owned or operated the facility at the time of disposal of any hazardous substance; (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances owned or possessed by that person; and (4) any

person who accepted any hazardous substances for the transport to disposal or treatment sites selected by that person. 42 U.S.C. § 9607(a)(1)-(4).

Cost recovery actions are subject only to three enumerated defenses: (1) an act of God; (2) an act of war; (3) an act or omission of a third party. 42 U.S.C. § 9607(b)(1)-(4). *See Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir.1993) (equitable defenses do not apply to Section 107 actions because Congress explicitly limited available defenses to those provided in Section 107(b)).

Section 107 defendants are strictly liable – that is, liability may be imposed without proof of causation – if there was a release or threat of release of a hazardous substance at a facility and a person incurred necessary response costs consistent with the National Contingency Plan. 42 U.S.C. § 9607(a); 42 U.S.C. § 9601(32); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989).

The scope of PRP liability is not defined by the text of Section 107. The legislative history, however, indicates that the federal courts should establish a uniform rule of liability in accordance with "traditional and evolving principles of law." *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 806-807 (S.D.Ohio 1983) (*quoting* statement of Rep. Florio, CERCLA's sponsor in the United States House of Representatives) (reprinted in 126 Cong.Rec. H11787 (Nov. 24, 1980)). With near unanimity, courts have found that section 107 liability is joint and several unless the defendant can demonstrate that the harm is divisible.

E.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 268-69 (3d Cir.1992).

To alleviate the potentially unfair burden that joint and several liability may cause, courts in CERCLA's early years created an implied cause of action for contribution. *E.g., United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984, 995 n. 8 (D.S.C.1984). This allowed defendants to sue other parties to obtain an equitable allocation of the costs of an environmental cleanup.

Congress codified the right of contribution in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.). The contribution provision, CERCLA Section 113(f), provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action . . . under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under . . . section 9607 of this title.

42 U.S.C. § 9613(f). The House Energy and Commerce Committee report states: "This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." H.R.Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 79,

reprinted in 1986 U.S.C.C.A.N. 2835, 2861 (*citing United States v. South Carolina Recycling and Disposal, Inc., supra*).

Instead of clarifying and confirming the right of contribution, however, these amendments "ignited a firestorm" of litigation and judicial controversy. Ann Alexander, *Standing Under Superfund §§ 107 and 113: Avoiding the Error of the Blind Man and the Elephant*, Toxics L.Rptr. (BNA) 155 (July 12, 1995) (hereinafter *Standing Under Superfund*). The chief source of this controversy was the fact that the amendments added several new provisions to CERCLA – including Section 113 – without specifically clarifying their relationship to Section 107. *Id.* One of the most frequently litigated issues arising from this controversy concerns the problem of PRP standing under section 107.[4]

II. The Parties' Contentions

Defendants argue that Plaintiffs lack standing to bring a cost recovery action pursuant to Section 107(a)(4)(B). They contend that the cost recovery action, with its judicially-fashioned provision for joint and several liability, was intended for use only by governmental

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[4] Interpretational problems involving various provisions in CERCLA confronted the federal courts even before the enactment of the SARA amendments. *E.g., United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H.1985) (recognizing that "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history"). These problems stem, in part, from the fact that the enacted version of CERCLA was the result of several last- minute legislative compromises. *See Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir.1985).

and "innocent" private parties. Because Plaintiffs are potentially responsible parties, they should not be allowed to impose joint liability upon other PRPs. Instead, their action should be recognized for what it is – a "quintessential" claim for contribution arising under CERCLA Section 113(f).

Plaintiffs argue that the plain language of Section 107 authorizes "any . . . person," not "any innocent person," to bring a cost recovery action, so long as that person has incurred cleanup costs. They contend that this position is consistent with the language and policies of CERCLA.

III. Discussion

An examination of the statutory language, policy, and case law demonstrates that Plaintiffs have standing under Section 107.

A. Statutory Text

The Court begins its task of interpreting CERCLA Section 107(a)(4)(B) by reviewing two critical cannons of statutory interpretation. First, in interpreting a statutory provision, a court must look to the statute's plain language. *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1916). Where the language of the statute is plain and unambiguous on its face, "the sole function of the courts is to enforce it according to its terms." *Id. See also United States v. Behnezhad*, 907 F.2d 896, 898 (9th Cir.1990).

Second, when a court is construing a remedial statute, it must construe the statutory language broadly in

order to give effect to the statute's remedial purposes. *See, e.g., Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 803 (9th Cir.1989) (courts are obligated to construe CERCLA provisions liberally because it is a remedial statute designed to protect and preserve public health and the environment).

The plain language of CERCLA's private party standing provision, 42 U.S.C. § 9607(a)(4)(B), clearly and unequivocally grants standing to "any . . . person" who has incurred necessary response costs consistent with the National Contingency Plan. The text does not read "any innocent person."

Likewise, the provision conferring standing upon governmental and tribal entities creates no distinction between innocent and non-innocent plaintiffs. *See* 42 U.S.C. § 9607(a)(4)(A). Given the parallel language of these provisions, it would be anomalous to suggest that Congress intended to limit private party standing to "innocent" plaintiffs, while permitting standing for innocent and non-innocent governmental plaintiffs.[5]

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[5] Defendants argue that governmental entities are treated differently, because, as "enforcers" of the law, they are entitled to bring cost recovery actions regardless of culpability. Defendants cite no case authority for this proposition. The Court, however, has located a case that explicitly rejects this argument. *See Town of Wallkill v. Tesa Tape Inc.*, 891 F.Supp. 955, 960 (S.D.N.Y.1995) (even if a potentially responsible plaintiff was not a governmental entity, it still would be able to seek joint and several liability for response costs under section 107). Like the Southern District of New York, this Court refuses to rewrite section 107 by carving out a distinction between governmental and private party plaintiffs.

Similarly, the enumerated defenses set forth in Section 107(b) make no distinction between innocent and non-innocent plaintiffs, and courts have consistently held that the narrow language of Section 107(b) precludes defenses based on a plaintiff's status as a potentially responsible party. *See General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir.1990) ("CERCLA does not provide for an 'unclean hands' defense"), *cert. denied*, 499 U.S. 937, 111 S.Ct. 1390, 113 L.Ed.2d 446 (1991); *Hassayampa v. State of Arizona*, No. CIV 89-0188 PHX RCB, 1989 WL 248273, at *10-11, 1989 U.S.Dist. LEXIS 17411, at *27-29 (D.Ariz. Dec. 27, 1989) (rejecting unclean hands defense).

In light of the explicit language of Section 107, this Court finds that Section 107 confers standing upon any party who has incurred response costs – regardless of culpability. *See Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*, 891 F.Supp. 221, 225 (E.D.Pa.1995) (plain language of Section 107 indicates that Congress intended cost recovery standing to sweep broadly). The plain language of the statute draws no distinction between innocent and non-innocent plaintiffs, or between public and private plaintiffs; the only distinction drawn is that between parties who have incurred response costs and those who have not.

Nothing in the SARA amendments explicitly qualifies the plain language of Section 107. Section 113(f)(1) provides a right of contribution for private parties. However, this section does not provide that contribution is the exclusive remedy for potentially liable parties. *Id.* at 225.

This conclusion is supported by a comparison of the statutes of limitations for cost recovery and contribution actions added by the SARA amendments. The three-year statute of limitations for contribution claims begins to run on the date of judgment, administrative order, or entry of a judicially-approved settlement concerning costs or damages. 42 U.S.C. § 9613(g)(3). In contrast, the six-year statute of limitations for a claim to recover remediation costs begins to run after initiation of physical on-site construction. 42 U.S.C. § 9613(g)(2). If parties who voluntarily clean up are limited to suing under Section 113(f), it would appear that no statute of limitations applies to them. *Bethlehem Iron Works*, 891 F.Supp at 225. This statutory anomaly suggests that the SARA amendments do not bar PRPs from pursing [sic] cost recovery claims.[6]

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[6] Defendants argue that, under Plaintiffs' interpretation of the statute, the three year statute of limitations for contribution actions would be swallowed by the longer limitations period for cost recovery actions. Several courts have endorsed this argument. *E.g., United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 101 (1st Cir.1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1176, 130 L.Ed.2d 1128 (1995).

This argument was convincingly answered in *United States v. J.M. Taylor*, 909 F.Supp. 355, 365 (M.D.N.C.1995), where the court stated:

> Section 113(g)(3) clearly contemplates that a party bringing a contribution action will have been subjected to a judgment or a court approved settlement. . . . However, a PRP which conducts an environmental cleanup will not necessarily have suffered a judgment or court approved settlement and, thus, cannot bring a contribution action – and this includes one subjected to a Section 106 administrative order. A party which completes a

Furthermore, substantial weight should be given to the fact that Congress expressly intended Section 113 to confirm preexisting case law. That case law generally interpreted Section 107 broadly to afford a cause of action to liable and non-liable parties alike.[7]

Defendants argue that allowing Plaintiffs Section 107 standing would frustrate contribution protection, a provision added by the SARA amendments to protect persons who have settled with the government from contribution claims regarding matters addressed in the settlement. 42

> removal or remedial action as referenced in Section 113(g)(2) arguably needs the extra time of the six-year period because it is busy doing the cleanup. On the other hand, a party which has incurred fixed liability would arguably need only the shorter three-year period from the time such liability was imposed.

The *Taylor* court correctly perceived that an action for contribution must be preceded by a judgment, settlement or administrative order which fixes a party's total liability. This statutory prerequisite means that the three-year statute of limitations for contribution actions will not necessarily be consumed by allowing non-innocent parties to sue under section 107.

[7] *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889-90 (9th Cir.1986) (allowing potentially responsible party to bring cost recovery suit under section 107). *Accord, NL Indus. v. Kaplan*, 792 F.2d 896, 897-98 (9th Cir.1986); *United States v. New Castle County*, 642 F.Supp. 1258, 1264 (D.Del.1986); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F.Supp. 283, 290 (N.D.Cal.1984); *United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710, at *1-2 (E.D.N.C. May 14, 1984); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F.Supp. 1437, 1443 (S.D.Fla.1984); *Jones v. Inmont Corp.*, 584 F.Supp. 1425, 1428-29 (S.D.Ohio 1984); *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1143 (E.D.Pa.1982).

U.S.C. § 9613(f)(2). Defendants contend that Plaintiffs might abuse this provision by settling with the government for the entire cost of the cleanup, thereby insulating themselves from Defendants' contribution counterclaims.

Early settlement, however, does not constitute an abuse of the statute. Instead, prompt settlement is purposefully encouraged by CERCLA's regulatory scheme, which subjects non-settling parties to the risk of disproportionate liability. *See Atlantic Richfield Co. v. American Airlines, Inc.*, 836 F.Supp. 763, 775 (N.D.Okla.1993) (risk of disproportionate liability created by contribution protection creates strong incentives for early or universal settlement). *See also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 89 (1st Cir.1990) ("rewarding PRPs who settle sooner rather than later is completely consonant with CERCLA's makeup"); *Arizona ex rel. Woods v. Nucor Corp.*, 825 F.Supp. 1452, 1463 (D.Ariz.1992) (risk of excess liability is integral part of CERCLA), *aff'd, Arizona v. Components Inc.*, 66 F.3d 213 (9th Cir.1995).

Moreover, any potential for abuse emanating from a settlement between Plaintiffs and the government is substantially mitigated by the fact that any settlement must be approved by the Court. *City of New York v. Exxon*, 697 F.Supp. 677, 692 (S.D.N.Y.1988) (court must review settlements for fairness, reasonableness, and consistency with the Constitution and the mandate of Congress).

Based on the foregoing analysis, the Court refuses to engraft the word "innocent" onto the phrase "any . . . person" set forth in Section 107(a)(4)(B). This decision is supported by an analysis of CERCLA policy and case law, to which the Court now turns.

B. CERCLA Policy

Courts have characterized CERCLA's goals as two-fold: encouraging the prompt and voluntary cleanup of hazardous wastes; and imposing the costs of cleanup on responsible parties. *E.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir.1986); *Bethlehem Iron Works*, 891 F.Supp. at 225; *United States v. SCA Services of Indiana, Inc.*, 849 F.Supp. 1264, 1284 (N.D.Ind.1994).[8]

Under Plaintiffs' reading of Section 107, potentially responsible plaintiffs who initiate an environmental cleanup may sue for cost recovery and initially shift the cost of the cleanup to other PRPs. *See United States v. Kramer*, 757 F.Supp. 397, 416 (D.N.J.1991) (under Section 107 a PRP may "go in, clean up the mess, pay the bill, then collect all its costs not inconsistent with the NCP from other responsible parties"). Where plaintiffs are also liable parties, however, defendants may assert counterclaims pursuant to Section 113(f), ensuring that plaintiffs do not escape from paying an equitable share of the cleanup cost. *Id.* at 416 ("Any PRP is entitled under Section 113 to bring a contribution action against other PRPs – including the PRP who previously cleaned up the mess and was paid for its trouble through a Section 107 proceeding – to apportion costs equitably among all the PRPs.").

This two-step framework satisfies both of CERCLA's goals: it provides an array of incentives for private parties to initiate prompt environmental cleanups; and it

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[8] *See also Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 529 (6th Cir.1993) (noting that "the legislative history underlying SARA echoes the recurring theme of facilitating prompt cleanups with greater force than that underlying CERCLA's original enactment in 1980.").

ensures that cleanup costs will be equitably allocated among responsible parties.

Specifically, allowing PRPs to proceed under Section 107 creates several incentives for early cleanup and settlement. These incentives include: (1) shifting the difficult burden of proof concerning the allocation of cleanup costs from plaintiffs to defendants; (2) relieving plaintiffs of the risk of being held liable for "orphan shares" – cleanup costs that would otherwise be charged to insolvent or absent parties; (3) minimizing plaintiffs' transaction costs involved in tracking down and suing every PRP; (4) limiting the range of available defenses to those enumerated in Section 107(b); and (5) giving parties who initiate cleanups the benefit of a longer statute of limitations. *See United States v. Atlas Minerals & Chems., Inc.*, No. 91-5118, 1995 WL 510304, at *99, 1995 U.S.Dist. LEXIS 13097, at *222 (E.D.Pa. Aug. 22, 1995); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F.Supp. 1100, 1118 (N.D.Ill.1988), *overruled sub silentio by Akzo Coatings v. Aigner Corp.*, 30 F.3d 761 (7th Cir.1994). In combination, these factors provide private parties with strong incentives to initiate voluntary cleanups of hazardous waste sites.

These incentives work in tandem with disincentives targeted at PRPs who resist participating in cleanups or settlements. Illustratively, in *Atlantic Richfield Co.*, 836 F.Supp. at 775 ("ARCO"), the court permitted ARCO, the plaintiff in a cost recovery action, to impose joint and several liability upon certain defendants in order to encourage them to settle with ARCO. The court noted that "[s]ince non-settling parties remain jointly and severally liable, they pay the balance owed to plaintiff regardless of whether any settling defendant has paid more or

less than its proportionate share. The practical effect in a case where the total cost of the remediation has not been finally fixed is to increase the risk the longer a defendant stays in the suit, creating a strong incentive for earlier and/or universal settlement." *Id.*[9]

If Plaintiffs are not allowed to seek joint and several liability, the foregoing incentive scheme would be turned on its head. In a contribution action, Plaintiffs would bear the burden of proving that they had assumed more than their fair share of cleanup costs in remediating the Pinal Creek site. To recover monies expended in excess of their fair share, they might have to track down and sue every potentially responsible party, incurring considerable transaction costs. They would also risk being stuck with cleanup cost shares attributable to absent or insolvent parties. Moreover, Plaintiffs would not be able to wield the threat of disproportionate liability against Defendants to encourage early settlement.

As a result, Plaintiffs would face several barriers in attempting to recoup their cleanup costs. This result is at war with CERCLA policy, because Plaintiffs would be less likely to voluntarily perform a lengthy and costly cleanup if the prospect of recovering their costs is remote and expensive. *Standing Under Superfund, supra.* Plaintiffs might even choose to contest their liability rather than initiate a cleanup. *Id.*

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[9] Defendants have argued that the possibility of settlement in this case will significantly increase if the Court dismisses Plaintiffs' cost recovery claims. Given the adversarial and zealous litigation stance of the parties up to this point, the Court finds this argument unconvincing.

However, by mitigating the risks involved in private party remediation of hazardous waste sites, affording PRPs Section 107 standing furthers the fundamental CERCLA goal of promoting expeditious voluntary cleanups. *See* Mem. of Amicus Curiae City of Phoenix Regarding Cost Recovery under CERLA at 4 ("Private parties who come forward, enter settlements, clean up sites, and seek to recover their costs from PRPs that were unwilling to share responsibility must receive some benefit for their labors and costs. By no means should they suffer greater exposure and higher risk than PRPs that do nothing and wait to be sued.").

In their Amici Curiae briefs, the City of Phoenix and the State of Arizona underscore another important policy consideration: if PRPs are not allowed to sue under Section 107, then the viability of the CERLCA program itself will be jeopardized. (Mem. of Amicus Curiae City of Phoenix Regarding Cost Recovery under CERCLA at 2.) The Amici Curiae point out that there are currently fifty-six federal and state Superfund sites in Arizona. In light of the enormous financial burden involved in cleaning up these sites, they argue:

> Absent PRP contribution, the federal Superfund would be wholly insufficient to pay for remediation of NPL [National Priority List] sites, much less other impacted areas. The situation is more dire in Arizona, where the limited WQARF resources frequently preclude ADEQ from even suing PRPs to initiate cleanup, much less doing the work itself. . . . In short, unless liable parties continue to undertake prompt remediation themselves, the system will grind to a halt.

Id. These statements indicate that a narrow construction of Section 107 standing would eviscerate the government's ability to carry out the statutory purposes of CERCLA. While this argument is not necessary to the Court's holding, it lends strong support to Plaintiffs' position.

Finally, the absence of countervailing policy concerns supports Plaintiffs' in this case. Where a plaintiff brings a Section 107 claim merely to circumvent contribution protection granted by the government to another party pursuant to Section 113(f)(2), or to avoid the shorter statute of limitations for contribution actions, CERCLA policy militates against allowing Section 107 standing. *See Bethlehem Iron Works*, 891 F.Supp. at 225. However, Plaintiffs are not seeking to circumvent contribution protection or to avoid the shorter limitations period. Instead, they are attempting to shift many of the legal and financial risks associated with their cleanup to Defendants, who have so far refused to assist in the cleanup. These circumstances support allowing Plaintiffs to utilize Section 107 here.

C. Defendants' Common Law Argument

Instead of analyzing the parties' dispute from the standpoint of CERCLA policy, Defendants argue that the dispute should be analyzed with reference to the ordinary legal meaning of the term "contribution." Defendants cite Section 886A(1) of the Restatement (Second) of Torts (1979), which provides that "[w]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them,

even though judgment has not been recovered against all or any of them." Defendants argue that Plaintiffs' lawsuit is in substance an action for contribution, as that word is defined in the Restatement.[10]

Implicit in Defendants' reasoning is the assumption that Plaintiffs and Defendants stand on an equal legal footing because, as PRPs, they could be co-defendants in a cost recovery action brought by a third party.

This assumption ignores the fact that CERCLA Section 107 differentiates between responding and non-responding parties and confers significant legal advantages upon litigants in the former category. Under CERCLA Section 107(a)(4)(A)-(B), any person who incurs response costs may sue for cost recovery, simply because that person is acting to address the threat to human health and the environment posed by hazardous wastes. Here, Plaintiffs are currently involved in cleaning up the Pinal Creek basin. Defendants are doing nothing. Consequently, Plaintiffs and Defendants do not stand in an equal legal relationship with each other under the terms of the statute.

This analysis is consistent with traditional principles of common law. The principle of indemnity, which significantly pre-dates that of contribution, allowed a tortfeasor to recover from another the entire cost of a

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[10] Several courts have rejected PRP standing under section 107 on the basis of this line of reasoning. *E.g., City of Fresno v. NL Indus., Inc.*, No. CV-F 93-5091 REC/DLB, 1995 WL 641983, *2-5, 1995 U.S.Dist. LEXIS 15534, *15-19 (E.D.Cal. July 13, 1995) (collecting cases).

joint liability.[11] Traditionally, whether indemnity or contribution applied in an action among joint tortfeasors usually turned upon an assessment of the blameworthiness of the parties. According to comment a of Restatement (Second) of Torts (1979) § 886B:

> The explanation apparently lies in the utilization of the Latin maxim, *In pari delicto potior est conditio defendentis* (In equal guilt, the position of the defendant is the stronger). A suit for contribution is brought for the recovery of a proportionate part of the sum paid by the plaintiff, on the ground that the parties were both guilty of negligence and should share the cost; the parties being equally guilty, the maxim applies. A suit for indemnity is brought to recover the total amount of payment by the plaintiff, on the ground that the plaintiff's conduct was not as blameworthy as the defendant's; the parties not being *in pari delicto*, the maxim does not apply.

The distinction drawn in CERCLA Section 107 between responding and non-responding parties recognizes that responding parties are less blameworthy than other PRPs because they have began [sic] to assist in a cleanup. Under traditional common law analysis, Plaintiffs, as

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[11] The Restatement (Second) of Torts (1979) defines indemnity between tortfeasors in section 886B(1) as follows:

> If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of liability.

responding parties, are not *in pari delicto* with Defendants, and therefore are entitled to recover (at least in the first instance) their entire cleanup costs.

This reasoning is supported by pre-SARA case law, which Congress sought to "clarify and confirm" by enacting Section 113. Early CERCLA case law generally recognized the right of culpable private parties to obtain *indemnification* and/or contribution from recalcitrant parties for remediation costs. *See United States v. Ward*, No. 83-63-CIV-5, 1984 WL 15710, at *1-2 (E.D.N.C. May 14, 1984) (recognizing PRP's cost recovery action as one for indemnity or contribution); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F.Supp. 1437, 1443 (S.D.Fla.1984) (same).

Moreover, pre-SARA case law recognized that a plaintiff's PRP status did not obliterate the statutory distinction between responding and non-responding parties. In *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1143 (E.D.Pa.1982), the City of Philadelphia, a PRP and an owner of a hazardous waste disposal site, brought a section 107 action against various defendants who had dumped waste at the site. Defendants filed a motion for judgment on the pleadings, arguing that the "any other person" language of Section 107(a)(4)(B) referred to persons other than those designated as potentially responsible parties under the statute. *Id.* at 1142.

The court rejected this contention. It noted that CERCLA was designed to encourage prompt cleanups, and that Section 107 "is an integral part of the statute's method of achieving this goal for it gives a private party the right to recover its response costs from responsible

third parties which it may choose to pursue rather than claiming against the [federal Superfund]." *Id.* at 1143.

The court then held that the City should be allowed to recover its response costs despite its status as a PRP. *Id.* It stated: "I cannot conclude that the City's right to maintain this action is barred by the hypothetical possibility that had the federal or state government brought this suit, the City too would be liable. . . . The simple fact is that. . . . a party which has incurred response costs seeks to recover them from responsible parties, an action expressly authorized by CERCLA." *Id.*

Accordingly, the Court finds that traditional legal principles support PRP standing under Section 107.[12]

D. The Case Law

There is a split of authority in this and other Circuits regarding the issue of PRP standing under Section 107. The recent trend holds that PRPs lack Section 107 standing. Nevertheless, this Court finds that the most persuasive cases support PRP standing. A survey of the relevant case law follows.

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[12] Evolving legal principles also support this conclusion. In Arizona, for instance, the state legislature chose to abolish traditional joint and several liability by enacting the Uniform Contribution Among Joint Tortfeasors Act, A.R.S. §§ 12-2501 to 12-2509. However, the legislature expressly created an exception for environmental actions. *See* A.R.S. § 12-2506(D)(2) ("Nothing in this section prohibits the imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.").

1. Supreme Court

In *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), the Supreme Court addressed the question of whether attorney's fees are "necessary costs of response" within the meaning of CERCLA Section 107(a)(4)(B). The petitioner, one of several parties responsible for contaminating a landfill, had brought a Section 107 action to recover its cleanup costs from other responsible parties. The court concluded that a party suing under Section 107 may recover attorney's fees for the identification of other potentially responsible parties, but may not recover fees for the preparation and negotiation of an agreement with a government agency or for the prosecution of CERCLA litigation. *Id.* at ___, 114 S.Ct. at 1967.

The *Key Tronic* decision was based, in part, on the assumption that a liable party may prosecute a cost recovery action under Section 107. This assumption lends some support to Plaintiffs' argument. However, because the Supreme Court did not squarely confront the issues underlying this assumption, *Key Tronic* is of limited value in deciding the issue before this Court.

2. Circuit Courts of Appeal

Defendants assert that "[e]very Court of Appeals, including the Ninth Circuit, to consider the question has held that liable parties may sue under CERCLA only for contribution, regardless of whether the claim is pled under Section 107(a) or Section 113(f)(1)." (Joint Reply at 4.) (Emphasis omitted.) This assertion is inaccurate and misleading.

The First, Seventh, and Tenth Circuit Courts of Appeal have issued opinions supporting Defendants' position. *See United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 98-103 (1st Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1176, 130 L.Ed.2d 1128 (1995); *Akzo Coatings v. Aigner Corp.*, 30 F.3d 761, 764-65 (7th Cir.1994); *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535-36 (10th Cir.1995).[13]

The Seventh Circuit, however, has not spoken with one voice. In *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir.1993), *cert. denied*, 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994), Judge Posner recognized that CERCLA Section 107(a)(4)(B) "permits one responsible person to recover all or part of its response costs from another." The *Akzo* decision does not cite or discuss *Amcast*.

The Sixth and Eighth Circuit Courts of Appeal have decided cases supporting Plaintiffs' position. *See Velsicol*

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[13] These cases are distinguishable because they each involved the presence of "a direct external legal compulsion in the form of a government order or enforcement action." (Pls.' Resp. to Def. ARCO's Mot. to Dismiss Pls.' Cost Recovery Claims and Joinders of Other Defs. at 29.) According to Plaintiffs, the element of external legal compulsion is lacking here, because the ADEQ did not formally order Plaintiffs to initiate the cleanup. Defendants contest this characterization of the facts; nevertheless, on motions to dismiss and for judgment on the pleadings, the facts as Plaintiffs have stated them must be taken as true. In addition, Plaintiffs' characterization finds support in *In re Dant & Russell, Inc.*, where the court considered BN's decision to undertake the long-term cleanup of its property as voluntary despite the EPA's order directing BN to take initial emergency cleanup measures. 951 F.2d 246, 248-49 (9th Cir.1991).

Chem. Corp., 9 F.3d at 529 (6th Cir.1993) (PRP may sue under section 107(a)(4)(B)); *General Electric Co.*, 920 F.2d at 1421 (8th Cir.1990) (liable party entitled to recover response costs under Section 107(a)(4)(B)). However, the Eighth Circuit has recently decided a case which appears to support Defendants. *See Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 n. 4 (8th Cir.1995)

Some language in *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir.1989) supports Defendants. However, the *Amoco* court merely endorsed the application of Section 113(f) in discussing the allocation of cleanup costs among the parties, after liability itself had already been adjudicated. Nothing in *Amoco* suggests that the court dismissed the PRP plaintiffs' cost recovery claims.

The only Ninth Circuit case discussing the relationship between CERCLA Sections 107 and 113 is *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir.1991) (*"Dant & Russell"*). Plaintiffs and Defendants each claim this case supports their respective positions.

Dant & Russell concerned a Section 107 cost recovery claim brought by Burlington Northern ("BN") against the bankruptcy estate of Dant & Russell ("D & R"). BN's claim involved property it owned since 1958 and had leased to D & R from 1971-1983. In 1985, the EPA ordered BN to conduct "Immediate Removal and Stabilization Activities" of hazardous wastes on the property. BN spent approximately $1 million complying with the order. In 1985, BN filed its Section 107 claim in D & R's bankruptcy case, requesting reimbursement in the amount of $14 million for past and future cleanup expenses. The

bankruptcy court awarded BN approximately $7 million, and the district court affirmed.

On appeal, the Ninth Circuit considered two issues: (1) whether BN's claim was barred by Section 502(e)(1)(B) of the Bankruptcy Code; and (2) whether the bankruptcy court erred by apportioning liability between BN and D & R.

Section 502(e)(1)(B) of the Bankruptcy Code provides, in part, that a bankruptcy claim for reimbursement or contribution will be disallowed if "the party asserting the claim is liable with the debtor on the claim of a creditor." *Dant & Russell, Inc.*, 951 F.2d at 248. The Ninth Circuit concluded that BN's claim was not barred because the "co-liability" requirement of Section 502(e)(1)(B) was not present. *Id.*

In particular, the court found that the co-liability requirement did not exist because "third parties are not competing over D & R's funds for cleanup. BN's claim against these funds arises from *no external legal compulsion* – there is no third party creditor here." *Id.* (Emphasis added.) The court derived this conclusion from an analysis of BN's CERCLA claim. It noted that BN's claim arose under CERCLA Section 107(a)(4)(B), a "private right of action [which] encourages voluntary private action to remedy environmental hazards. . . . [and] furthers CERCLA's goal of responding to hazardous situations quickly." *Id.* The court further noted that while BN had initially incurred some cleanup costs pursuant to an EPA order, it had voluntarily embarked on further cleanup operations without "EPA arm-twisting." *Id.* Therefore, there was no third party to whom both BN and D & R were "liable with" for the costs of BN's cleanup,

and BN's claim was not barred by the Bankruptcy Code. *Id.* at 249.

The court next considered whether the bankruptcy court erred by allocating liability between the parties, instead of shifting the entire liability to D & R. For purposes of allocating liability, the court held that CERCLA Section 113(f)(1) applied to BN's claim. It stated: "This section applies in this case for at least three reasons: (1) BN has admitted CERCLA liability; (2) this is a civil action under § 9607(a); and (3) D & R is arguing that BN should contribute to the cleanup operations." *Id.* The court therefore affirmed the Bankruptcy Court's allocation of liability between BN and D & R. *Id.*

While the *Dant & Russell* opinion is not a model of clarity, it appears to support Plaintiffs' argument that PRPs have standing to assert Section 107 cost recovery claims. The court based its holding that Section 502(e)(1)(B) of the Bankruptcy Code did not bar BN's claim on the fact that BN's claim was for cost recovery, not contribution. If BN's claim had arisen under CERCLA Section 113(f) in the first instance, then BN and D & R would have been co-liable to a third party. *Cf.* 42 U.S.C. § 9613(g)(3) (statute of limitations for contribution actions begins to run after entry of judgment, administrative order, or settlement). The existence of co-liability would have barred BN's bankruptcy claim. Therefore, the court's holding depends on the characterization of BN's claim as one for cost recovery.[14]

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[14] Defendants suggested at oral argument that the Ninth Circuit's opinion directly approved the reasoning of the District

Defendants urge this Court to draw a contrary principle from *Dant & Russell*: That when one PRP sues another,

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Court, which held that cleanup costs could be allocated between BN and D & R because "regardless of how BN characterized its CERCLA claim, the claim should be evaluated according to equitable principles of contribution." (*In re Dant & Russell, Inc.*, CV 86-0746-PA, at 11 (D. Oregon May 8, 1989), copy attached to Defs.' Joint Reply.) In particular, counsel pointed to the following language in *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir.1991): "For the reasons cited by the district court, we hold that the bankruptcy court did not abuse its discretion in this equitable apportionment of liability."

Counsel reads too much into this statement. The statement followed a review of the lower courts' apportionment of costs between BN and D & R, thereby indicating the Ninth Circuit's approval of the lower courts' allocation methodology. The statement does not indicate approval for the District Court's reasoning in applying contribution principles. Instead of merely adopting the District Court's reasoning, the Ninth Circuit set forth its own explanation of why CERCLA section 113(f) applied to the parties' dispute. That explanation indicates that the Ninth Circuit treated D & R's request for an allocation of costs as an implied contribution counterclaim. *See In re Dant & Russell, Inc.*, 951 F.2d at 249 (applying section 113(f) in part because D & R argued that BN should contribute to the cleanup costs).

In addition, the Ninth Circuit did not follow the District Court's reasoning concerning the issue of whether BN's claim was barred by section 502(e)(1)(B) of the Bankruptcy Code. Instead of finding (as the District Court did) that the claim was not barred because it was not contingent, the Ninth Circuit held that the claim was not barred because – due to the nature of BN's CERCLA section 107 claim – BN and D & R were not co-liable to a third party. Therefore, if the Ninth Circuit had approved the District Court's analysis of BN's claim as one that could be analyzed according to contribution principles, that approval would conflict with the Ninth Circuit's bankruptcy analysis.

the action is for contribution. The Court cannot accept this reading, because it is inconsistent with the logic of the Ninth Circuit's opinion. Accordingly, this Court does not follow cases that have read *Dant & Russell* in a pro-defendant manner. *See, e.g., Akzo,* 30 F.3d at 761 (7th Cir.1994) (citing *Dant & Russell* for the proposition that CERCLA claims brought by liable parties are "quintessential" contribution claims).

Cases such as *Akzo,* in addition to misreading *Dant & Russell,* engage in gross oversimplification when they state that a PRP's cost recovery action is in substance a mere claim for contribution. These cases fail to give due weight to statutory distinction between PRPs who incur response costs and those who do not – a distinction recognized by the Ninth Circuit in its discussion of the nature of BN's Section 107 claim. *Dant & Russell, Inc.,* 951 F.2d at 248. In addition, these cases fail to recognize that PRPs who are foreclosed from suing under Section 107 will be strongly discouraged from initiating cleanups – a result plainly inconsistent with CERCLA's fundamental goals. Accordingly, this Court finds such cases unpersuasive and refuses to follow them.

3. District Courts

Federal district courts – both in the Ninth Circuit and elsewhere – have split on the issue of whether an action brought by one potentially responsible party against another may proceed under Section 107. *Compare Transportation Leasing Co. v. State of California,* 861 F.Supp. 931, 938 (C.D.Cal.1993) ("CERCLA permits [PRP] plaintiffs to sue under § 107. Section 113 does not abrogate § 107 but

instead codifies the efforts of federal courts to imply a contribution remedy to assist those held jointly and severally liable."); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F.Supp. 283, 291 (N.D.Cal.1984); *Idylwoods Assoc. v. Mader Capital, Inc.*, 915 F.Supp. 1290, 1312-14 (W.D.N.Y.1996); *United States v. J.M. Taylor*, 909 F.Supp. 355, 366 (M.D.N.C.1995) (whether a party may utilize Section 107 depends on whether it has incurred "necessary costs of response," not on whether that party is potentially responsible); *Barmet Aluminum Corp. v. Brantley & Sons, Inc.*, 914 F.Supp. 159, 161 (W.D.Ky.1995); *Town of Wallkill v. Tesa Tape Inc.*, 891 F.Supp. 955, 960 (S.D.N.Y.1995) ("even if the Town were not a governmental plaintiff, it would be entitled to maintain both § 107 and § 113 claims"); *Bethlehem Iron Works*, 891 F.Supp. at 225 (permitting plaintiffs to raise Section 107 claims comports with CERCLA's goal of encouraging prompt voluntary private party cleanups; any unfairness that might result from the imposition of joint and several liability will be remedied through the resolution of defendant's contribution counterclaim); *United States v. Atlas Minerals and Chem., Inc.*, No. 91-5118, 1995 WL 510304, at *76-81, 1995 U.S.Dist. LEXIS 13097, at *211-230 (E.D.Pa. Aug. 22, 1995); *Companies for Fair Allocation v. Axil Corp.*, 853 F.Supp. 575, 580 (D.Conn.1994); *with, Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F.Supp. 1509, 1513-16 (D.Or.1995) (PRPs are joint tortfeasors; therefore they cannot impose joint and several liability on defendants under Section 107); *City of Fresno v. NL Indus., Inc.*, No. CV-F 93-5091 REC/DLB, 1995 WL 641983, at *5, 1995 U.S.Dist. LEXIS 15534, at *19-20 (E.D.Cal. July 12, 1995); *T H Agriculture & Nutrition Co., Inc. v. Aceto Chemical Co., Inc.*, 884

F.Supp. 357, 360 (E.D.Cal.1995) (weight of authority supports finding that PRP may only seek contribution for response costs); *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F.Supp. 1212, 1216 (N.D.Cal.1994); *Kamb v. U.S. Coast Guard*, 869 F.Supp. 793, 799 (N.D.Cal.1994) (*In re Dant & Russell* dictates that action brought by PRP sounds in contribution); *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F.Supp. 644, 652 (N.D.Ohio 1995) (PRP's Section 107 claim must be construed as a contribution action); *New Castle County v. Halliburton NUS Corp.*, 903 F.Supp. 771, 779 (D.Del.1995); *The Ekotek Site PRP Comm. v. Self*, 881 F.Supp. 1516 (D.Utah 1995). For the reasons set forth above, the Court finds persuasive those cases favoring Plaintiffs' position.

Accordingly, Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings concerning Plaintiffs' federal cost recovery claims are denied.

State Law Cost Recovery Claims

Defendants also seek dismissal of Plaintiffs' state law cost recovery claims. These claims arise under A.R.S. § 49-285(A), which provides that "any other person" in addition to the state may bring an action to recover remediation costs. Nothing in this or any other related statutory provision suggests that the Arizona legislature intended this cause of action to be limited to only "innocent" persons. The Court must construe the plain language of the statute to allow Plaintiffs to state their cost recovery claims under A.R.S. § 49-285. *See Janson v. Christensen*, 167 Ariz. 470, 808 P.2d 1222, 1223 (1991) ("the most reliable index of a statute's meaning is its language and

when the language is clear and unequivocal it is determinative of the statute's construction"). Accordingly, Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings concerning Plaintiffs' state law cost recovery claims are denied.

ARCO's Motion to Dismiss Inspiration's Contribution Claim

In a separate motion, ARCO seeks dismissal of Plaintiff Inspiration Consolidated Copper Company's ("Inspiration") cost recovery and/or contribution claims against ARCO. ARCO contends that Inspiration is attempting to shift its corporate liabilities to ARCO merely because a corporate predecessor to ARCO once held a minority ownership interest in Inspiration. ARCO further contends that under well-established principles of corporate law, a corporation may not pierce the corporate veil in order to impose liability on its own shareholders.

ARCO's motion is misplaced because Inspiration is not attempting to pierce its own corporate veil. Rather, Plaintiffs' complaint alleges that ARCO is directly liable under CERCLA as a former "owner or operator" of polluting facilities in the Pinal Creek drainage basin. *See* 42 U.S.C. § 9607(a)(2).

According to the Complaint, Inspiration operated various mines and mining-relating properties from 1923 to June 1988 in the Pinal Creek area. Until 1976, the Anaconda Company – which merged into ARCO in 1981 – controlled and actively participated in the operations of

Inspiration, "directly or through its wholly-owned subsidiary ISRC [International Smelting and Refining Company]. This control and participation was accomplished through direct or indirect ownership of a controlling interest in Inspiration, and common officers, directors and senior management personnel." (Complaint at ¶ 32.) The Complaint also alleges that, "[a]s a result of their common control by Anaconda, the activities of ISRC and Inspiration were closely coordinated, and the companies shared numerous resources and operations, including employees, water sources [and] machinery. . . . Anaconda [also] exercised a controlling influence over the management, policies and operations of both ISRC and Inspiration, including their environmental practices. . . . *Id.* at ¶ 33.)

These allegations are sufficient to set forth a claim for "owner or operator" liability under CERCLA Section 107. *See Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir.1992) ("operator" liability attaches if defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment). *See also United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir.1990) (corporation that was an owner through holding a security interest and became active in the management of the corporation held liable under CERCLA); *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 27-28 (1st Cir.1990) (parent corporation which exerted practical total influence and control over subsidiary's operations, including environmental matters, subjected to CERCLA liability), *cert. denied*, 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991); *Idylwoods Assoc.*, 915 F.Supp. at 1306-07 (operator

liability imposed upon parent corporation that exercised extensive control over subsidiary's management and operations).

In particular, Defendants' arguments are squarely rejected in *Sidney S. Arst v. Pipefitters Welfare Educ. Fund,* 25 F.3d 417, 420-21 (7th Cir.1994). In *Arst,* the district court granted a motion to dismiss the plaintiff's Section 107 claim on the ground that the complaint failed to state sufficient allegations that would justify "piercing the corporate veil" under Illinois law. *Id.* at 419.

The Seventh Circuit reversed, holding that the complaint contained sufficiently specific allegations of defendant's control over the polluting company's operations to support the imposition of "owner or operator" liability under CERCLA Section 107(a)(2). *Id.* at 420. The court observed that the CERCLA provision for "owner or operator" liability may occasionally conflict with state corporate law. Nevertheless, such conflict is unavoidable under the broad liability provisions of CERCLA. This is because, in enacting CERCLA, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. . . . These statutory goals indicate the corporate form alone will not shield entities that exhibit significant indicia of responsibility from CERCLA liability." *Id.* (*quoting John Boyd Co. v. Boston Gas Co.,* 775 F.Supp. 435, 441 (D.Mass.1991)).

Similarly, the Court finds that Plaintiffs' Complaint contains sufficient allegations of ownership and control to support the direct imposition of "owner or operator"

liability upon ARCO. Therefore, ARCO's motion is denied.

Accordingly,

IT IS ORDERED denying Defendants' Motion to Dismiss Plaintiffs' Cost Recovery Claims and Defendants' Motion for Judgment on the Pleadings as to Plaintiffs' Cost Recovery Claims (Document No. 374 and 384).

FURTHER ORDERED denying Defendant ARCO's Motion to Dismiss Inspiration's Contribution Claim (Document No. 375).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE PINAL CREEK GROUP, consisting of Cyprus Miami Mining Corporation, Inspiration Consolidated Copper Company, and Magma Copper Company, Plaintiff-Appellee, v. NEWMONT MINING CORP., OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, ATLANTIC RICHFIELD COMPANY, PHELPS DODGE CORPORATION, Defendants-Appellants.	No. 96-16334 DC No. CV 91-1764 PHX ROS ORDER (Filed Aug. 11, 1997)

Before: GOODWIN, FERGUSON and TASHIMA, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Judge Tashima has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Ferguson so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

§ 9607. Liability [CERCLA § 107]

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

(1) The owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by –

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed –

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C. 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, ($8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities

under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount of least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a

hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the

liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Actions Involving natural resources; maintenance, scope, etc.

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled

* * *

§ 9613. Civil proceedings [CERCLA § 113]

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter

resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action

under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced –

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after –

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run –

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title

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§ 9606. Abatement actions

[CERCLA § 106]

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this

section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of Title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j-4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of Title 15.

(Pub.L. 96-510, Title I, § 106, Dec. 11, 1980, 94 Stat. 2780; Pub.L. 99-499, Title I, §§ 106, 109(b), Oct. 17, 1986, 100

Stat. 1628, 1633; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1980 Acts. House Report No. 96-1016(Parts I and II) and Related Report No. 96-172, see 1980 U.S. Code Cong. and Adm. News, p. 6119.

1986 Acts. House Report No. 99-253(Pars I-V), House Conference Report No. 99-962, and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 2835.

House Conference Report No. 99-841 and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 4075.

References in Text

Section 1321(c)(2) of Title 33, referred to in subsec. (c), was amended generally by Pub.L. 101-380, Title IV, § 4201(a), Aug. 18, 1990, 104 Stat. 523. Prior to general amendment, subsec. (c)(2) related to preparation of a National Contingency Plan. Provisions relating to a National Contingency Plan are contained in section 1321(d) of Title 33, Navigation and Navigable Waters.

Effective Dates

1986 Acts. Amendment by Pub.L. 99-499 effective Oct. 17, 1986, see section 4 of Pub.L. 99-499, set out as a note under section 9601 of this title.

Delegation of Functions

Functions vested in the President by subsec. (a) of this section delegated, subject to section 4(a), (b)(1) of Ex. Ord. No. 12580, and with authority to redelegate, to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors, see sections 4(c)(1), 11(g) of Ex. Ord. No. 12580, Jan. 23, 1987, 52 F.R. 2923, set out as a note under section 9615 of this title.

Functions vested in the President by this section delegated, subject to section 4(a), (b)(1) and (c)(1) of Ex. Ord. No. 12580, and with authority to redelegate, to the Administrator of the Environmental Protection Agency, see sections 4(d)(1), 11(g) of Ex. Ord. No. 12580, Jan. 23, 1987, 52 F.R. 2923, set out as a note under section 9615 of this title.

Authority under subsec. (a) of this section to seek information, entry, inspection, samples, or response actions from Executive departments and agencies to be exercised only with the concurrence of the Attorney General, notwithstanding any other provisions of Ex. Ord. No. 12580, see section 4(e) of Ex. Ord. No. 12580, Jan. 23, 1987, 52 F.R. 2923, set out as a note under section 9615 of this title.

Functions vested in the President by subsec. (a) of this section delegated, subject to section 4(a), (b)(1), of Ex. Ord. No. 12580, to the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, the Secretary of Defense, and the Secretary of Energy, to be exercised only with the concurrence of the Coast Guard, with respect to any releases or threatened release in the

coastal zone, Great Lakes waters, ports, and harbors, affecting (1) natural resources under their trusteeship, or (2) a vessel or facility subject to their custody, jurisdiction, or control, and with other exceptions and stipulations, see section 4(c)(3) of Ex. Ord. No. 12580, Jan. 23, 1987, 52 F.R. 2923, as amended, set out as a note under section 9615 of this title.

Functions vested in the President by subsec. (a) of this section delegated, subject to section 4(a), (b), and (c)(1) of Ex. Ord. No. 12580, to the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, the Secretary of Defense, and the Department of Energy, to be exercised only with the concurrence of the Administrator, with respect to any release or threatened release affecting (1) natural resources under their trusteeship, or (2) a vessel or facility subject to their custody, jurisdiction, or control, and with other exceptions and stipulations, see section 4(d)(3) of Ex. Ord. No. 12580, Jan. 23, 1987, 52 F.R. 2923, as amended, set out as a note under section 9615 of this title.

Coordination of Titles I to IV of Pub.L. 99-499

Any provision of Titles I to IV of Pub.L. 99-499, imposing any tax, premium, or fee; establishing any trust fund; or authorizing expenditures from any trust fund, to have no force or effect, see section 531 of Pub.L. 99-499, set out as a note under section 1 of Title 26, Internal Revenue Code.

Supreme Court, U.S.
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No. 97-795

In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFF-SHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," 42 U.S.C. § 9601, *et seq.*) provides that certain persons (usually referred to as potentially responsible parties, or "PRPs") are liable for response costs incurred in cleaning up hazardous waste disposal sites. Section 107 does not specify whether the liability is joint and several or merely several. A related section of CERCLA, section 113, provides that "any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106] or under [section 107(a)]." The question presented by this case is:

> Whether the Ninth Circuit correctly joined the five other circuits to have faced the issue in holding that, under CERCLA sections 107 and 113, when a liable party incurs response costs, it may maintain a contribution action against other PRPs to recover an equitable share of those costs, but the liable party cannot maintain an action against other PRPs for joint and several liability.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Court, Respondents state the following:

Newmont Mining Corporation does not have a parent company. Newmont Mining Corporation's non-wholly-owned subsidiary is Newmont Gold Company.

Occidental Petroleum Corporation does not have a parent company. Occidental Petroleum Corporation does not have any non-wholly-owned subsidiaries.

The parent company of CanadianOxy Offshore Production Company is CanadianOxy Holdings, Inc. CanadianOxy Offshore Production Company does not have any non-wholly-owned subsidiaries.

Atlantic Richfield Company ("ARCO") does not have a parent corporation. ARCO holds a controlling equity interest in the following corporate entities: ARCO Chemical Company; Canyon Fuel Co., LLC; Carson Cogeneration Co.; CH-Twenty, Inc.; Logan Aluminum Inc.; and Vastar Resources Inc. ARCO also holds equity interests in each of the corporate entities (many of which are wholly-owned subsidiaries) listed in the Appendix to this Brief in Opposition, beginning at App. 1.

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INTRODUCTION

Three issues fundamentally affect the propriety of and defeat the request for certiorari in this case. *First,* the Ninth Circuit's central holding, that Petitioners, as admittedly liable parties under CERCLA, are limited to seeking contribution from other PRPs for equitable apportionment of response costs, is both correct and consistent with the unanimous conclusion of the five other circuits to have considered this issue.[1] The Ninth Circuit properly rejected Petitioners' attempt to impose on Respondents joint and several liability.

Second, the Court of Appeals actually decided in Petitioners' favor the specific question that they have presented for review. Petitioners claim that "the court of appeals concluded that potentially liable parties may not bring private cost recovery claims under CERCLA Section 107(a)." Pet. 6. In fact, the Ninth Circuit held precisely to the contrary:

> Under the literal language of § 107, the Pinal Group, as a PRP, is partly responsible for its cleanup costs and, as "any other person" under § 107, can also hold other PRPs liable for a portion of those same costs.

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[1] The circuits are the First, Third, Seventh, Tenth, and Eleventh. *See United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (CA1 1994), *cert. denied*, 513 U.S. 1183 (1995); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (CA3 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (CA7 1994); *United States v. Colorado & E.R.R. Co.*, 50 F.3d 1530 (CA10 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (CA11 1996).

App. to Pet. for Cert. 7. Thus, as a technical matter, Petitioners have not suffered an adverse ruling on the question they ask this Court to review.

Third, this is an interlocutory appeal, and claims now pending in the case may be resolved in a manner that will make any opinion rendered by this Court purely advisory. Importantly in that regard, Petitioners recently have entered into a settlement agreement with the State of Arizona that, if approved, will remove this case from the purview of the CERCLA sections raised in the Petition. Judicial approval of the settlement would cause this case to be governed by section 113(f)(3), a statutory section addressed neither in the decision below nor in the Petition. For this reason, and others, this interlocutory appeal is not ripe for certiorari review.

In addition to these three fundamental points, it bears noting that The Environment and Natural Resources Division of the United States Department of Justice filed a brief as *amicus curiae* on behalf of the United States in the Ninth Circuit. In its brief and at oral argument, the United States opposed Petitioners' assertion that admittedly liable parties like Petitioners may bring a claim alleging joint and several liability against other PRPs. The United States argued that, "it is clear from all circuit courts that have faced the issue, including the Ninth Circuit, that whatever label is applied, plaintiffs, who have admitted liability, are entitled only to contribution. . . . " U.S. Dept. of Justice Br. 12. The United States also argued that CERCLA sections 107(a) and 113(f)(1) together provide a PRP with a contribution remedy:

> The United States does not believe that CERCLA §§ 107(a) and 113(f) provide separate and distinct causes of action, and that a claim for contribution is based exclusively upon § 113(f). Rather, actions that sound in contribution must be brought pursuant to CERCLA § 107(a) as governed by CERCLA § 113(f). Accordingly, that an action arises under § 107 does not automatically indicate that it is something other than an action in contribution.

Id. at 22. The Ninth Circuit adopted precisely this analysis. App. to Pet. for Cert. 8-9.

STATEMENT OF THE CASE

This case arises out of groundwater pollution in the Pinal Creek Drainage Basin (the "Site"), which is located in Gila County, Arizona. Petitioners (the "Pinal Group") are three mining companies – Cyprus Miami Mining Corporation, Inspiration Consolidated Copper Company, and BHP Copper Company (f/k/a Magma Copper Company) – that have banded together for purposes of this litigation. Cyprus and BHP currently mine and process minerals at various facilities within the Site, and have been operating there continuously for more than a decade. Inspiration, Cyprus's immediate predecessor, owned and operated facilities within the Site for more than seventy years. Petitioners have admitted that they are liable under CERCLA, as the Ninth Circuit so found. App. to Pet. for Cert. 14 n.5.

In the 1980s, the Arizona Department of Environmental Quality ("ADEQ") began investigating groundwater

contamination at the Site and the practices of the current operators. On May 8, 1989, ADEQ declared the Pinal Creek Basin a state WQARF (Arizona's analog to CERCLA) site and executed a Decision of Record authorizing use of money from WQARF to investigate and clean up the Site. Petitioners allege that they incurred response costs for conducting investigations of the groundwater and certain interim response measures.

In 1991 – after ADEQ declared the Site a state WQARF site – Petitioners brought this action against Respondents asserting not only a claim for contribution but also a claim for recovery of all alleged response costs on a theory of joint and several liability. Respondents are companies that either at one time owned mines at the Site or are alleged to have some relationship with former owners that purportedly makes them responsible for the former owners' activities at the Site. On September 18, 1995, ARCO, which was later joined by the other Respondents, moved to dismiss Petitioners' claim for joint and several recovery on the ground that a polluter who is admittedly liable under CERCLA may bring only a contribution claim to recover from another PRP its equitable, several share of the entire liability. The district court denied Respondents' motions.

On interlocutory appeal, the Ninth Circuit reversed the district court, ruling that admittedly liable parties such as Petitioners are limited under CERCLA to a contribution action for several-only liability. The court noted that its holding was consistent with its own precedent in *In re Dant & Russell, Inc.*, 951 F.2d 246 (CA9 1991), App. to Pet. for Cert. 10, and "with statements by the Supreme Court, and by five other circuits. . . . " *Id.* at 13 (citations

omitted). Despite the unanimity among the circuits on this issue, Petitioners seek to have this Court grant certiorari to review the Ninth Circuit's ruling.

SUMMARY OF REASONS FOR DENYING THE WRIT

Certiorari should be denied because the circuit courts have unanimously held that an admittedly liable party can maintain a claim against other PRPs for contribution only. A liable party has no claim against other PRPs to recover, jointly and severally, 100 percent of its costs. This is the only issue resolved by the Ninth Circuit in its well-reasoned opinion and it is the only issue referred to in the Petition which Petitioners have standing to raise. Other issues on which Petitioners assert the circuits conflict, such as the statute of limitations, are not presented in this case.

Certiorari also should be denied because the unanimous view of the circuit courts is correct. As the Ninth Circuit noted, a contrary approach permitting Petitioners to assert joint and several liability against PRPs is not supported by CERCLA's text, is inconsistent with this Court's decision in *Key Tronic* and the traditional doctrine of contribution, entails a significant risk of producing unfair results, and runs the risk of creating procedural chaos.

Moreover, the order that Petitioners present for review is interlocutory, and there is no factual record beyond the basic pleadings. It is highly uncertain whether the issue presented for review will have any

impact on the ultimate outcome of this case, because that outcome depends on the resolution of a number of liability and indemnity issues that have yet to be tried. For these reasons, as well as the proposed settlement, the Court should not grant certiorari at such an early stage of this case.

REASONS FOR DENYING THE WRIT

A. The Question Presented Is An Issue Over Which There Is No Dispute.

Contrary to Petitioners' representations, the issue presented to and decided by the Court of Appeals was *not* whether Petitioners' claim arose under section 107 or under section 113. Instead, the issue was whether, as admittedly liable parties, Petitioners could maintain an action against Respondents for joint and several liability, thereby seeking to shift to Respondents the totality of Petitioners' response costs. In rejecting Petitioners' attempt to do so, the Ninth Circuit correctly found that the question presented by Petitioners is not the true issue:

> We also note that [Petitioners'] argument is based on *the incorrect premise* that a contribution action is not brought under § 107. Thus, *the choice presented by this premise*, between a contribution action created and governed exclusively by § 113, on the one hand, and an independent "cost recovery" action available to working PRPs exclusively under section 107, on the other, *is a false one*.

App. to Pet. for Cert. 18 n.7 (emphasis added). Thus, the Petitioners suffered no adverse ruling on the question they present for review.

B. The Court of Appeals' Holding That a Liable Party May Not Assert a Joint and Several Claim Against Other PRPs, but Rather Is Limited to a Several Recovery Under Principles of Contribution, Is Consistent With the Decisions of Every Other Court of Appeals that Has Resolved the Issue.

Petitioners acknowledge that "[a]t first blush, the Ninth Circuit's decision appears merely to fall in line with decisions of the First, Third, Seventh, Tenth and Eleventh Circuits. . . . " Pet. 13-14. Indeed, all of the circuits that have addressed the issue have held that a liable party may sue other PRPs only for contribution. Petitioners nonetheless propose that these decisions are in conflict because of subtle (at best) differences in the language used to describe the rationale for what are identical conclusions as to whether liable parties may recover all of their costs from other PRPs on a theory of joint and several liability. This is a false conflict that provides no basis for a grant of certiorari.[2]

The Ninth Circuit was not concerned with how other circuit courts have addressed what is, in this case, a purely academic question of whether a liable party's claim against other PRPs arises exclusively under section

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[2] The Court declined to review this precise question two years ago. *See United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). There is no reason to treat this petition differently.

107(a) or section 113(f). This is the issue incorrectly presented for review by Petitioners and concerning which Petitioners assert that the circuit courts differ. The Ninth Circuit did, however, review the decisions of the remaining circuits on the issue presented by this case – whether a liable PRP could assert a joint and several claim for the totality of its response costs. On this issue, the Ninth Circuit found unanimity among the circuit courts:

> Our holding today is consistent with statements by the Supreme Court, and by five other circuits, recognizing in contexts similar to this one, that a CERCLA claim by a PRP against another PRP is necessarily for contribution.

App. to Pet. for Cert. 13; *accord New Castle County*, 111 F.3d at 1124 ("Where both parties are 'non-innocent' responsible persons . . . any action to reapportion costs between the parties is an action for contribution."); *Redwing Carriers*, 94 F.3d at 1496 ("Redwing is a responsible party under CERCLA, and therefore, its claims against other allegedly responsible parties are claims for contribution."); *Colorado & E.R.R. Co.*, 50 F.3d at 1536 ("[B]oth parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution."); *United Tech. Corp.*, 33 F.3d at 100 ("By contrast, 42 U.S.C. § 9613(g)(3) allows a 'non-innocent' party (*i.e.*, a party who himself is liable) only to seek . . . contribution rather than complete indemnity."); *Akzo Coatings*, 30 F.3d at 764 (stating that an action brought by "a party liable in some measure for the contamination . . . is a quintessential claim for contribution."). Petitioners do not and cannot demonstrate a

conflict among the circuit courts on this fundamental issue.[3]

Indeed, the courts that have addressed this issue since the Ninth Circuit's decision have confirmed this unanimity of circuit court authority. *E.g., Town of Oyster Bay v. Occidental Chem. Corp.*, ___ F. Supp. ___, No. 94-CV-0694 (FB), 1997 WL 760189 at *25 (E.D.N.Y. Dec. 5, 1997) ("All of the circuit courts to have considered this issue have determined . . . that a potentially responsible person . . . cannot seek joint and several liability against

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[3] Petitioners cite a number of law journal articles in support of their assertion that opinions of lower federal courts on the issue raised in the Petition are "widely divergent." Pet. 8-9 & n.6. However, all of these articles acknowledge that the split of authority on this issue exists only at the *district court* level. *E.g.*, Ann Alexander, *Standing Under Superfund §§ 107 and 113: Avoiding the Error of the Blind Man and the Elephant*, 10 Toxics L. Rep. (BNA) 155, 159 (July 12, 1995); R. Steven DeGeorge, *Seventh Circuit Decisions Further Confuse the Availability and Significance of CERCLA § 107 Standing*, 9 Envtl. Litig. Comm. Newsl. (ABA Sec. Litig., Chicago, Ill.), No. 1, at 1 (1997). Moreover, all but two of the articles cited were published before the Third, Ninth, and Eleventh Circuits joined the consensus established by the First, Seventh, and Tenth Circuits that liable and potentially liable parties are limited to contribution actions for several liability only. Other recent secondary authority addressing this issue recognizes the unanimity among the circuit courts. *See, e.g.*, Jose R. Allen & Karen L. Peterson, *Private Party Litigation Under Superfund: Claims for Cost Recovery and Contribution*, SB91 ALI-ABA 663, 674 (Am. Law. Inst.-ABA June 23, 1997) (recognizing that the lower courts are divided on the issue but a clear consensus has emerged among the circuit courts); Carol E. Dinkins & Lewis C. Sutherland, *Overview: Recent Trends and Developments in Environmental and Toxic Tort Litigation*, SB73 ALI-ABA 261, 275 (Am. Law Inst.-ABA January 23, 1997) (same).

other potentially responsible persons, but may only seek contribution. . . . "); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684, 689 (N.D. Ind. 1997) ("All other circuits which have considered the issue directly have agreed with the Seventh Circuit[ ]" that an action by a liable party against other PRPs is for contribution only). Thus, there is no split among the circuits on the issue addressed and decided by the Ninth Circuit.

C. The Decision of the Court of Appeals Is In Accord With CERCLA's Statutory Scheme and Legislative History, The Common Law, This Court's Decision in *Key Tronic*, and Sound Policy.

Petitioners assert that the Ninth Circuit incorrectly failed to interpret section 107 according to its "plain language." Pet. 21-27. In fact, on the issue decided by the Ninth Circuit, section 107 is silent. However, the Ninth Circuit's decision is mandated by the text, structure and legislative history of CERCLA, established common law principles, this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), and sound policy considerations.

1. The Court of Appeals Did Not Reject a Plain Language Interpretation of Section 107(a).

The "plain language" interpretation to which Petitioners refer means interpreting the phrase "any other person" in section 107(a)(4)(B) to authorize a claim by a liable party. Petitioners correctly point out that a number of courts have reached this conclusion. *See, e.g., Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193-94 (CA10 1997)

("our holding merely recognizes that . . . all actions by and between jointly and severally liable PRPs are 'actions under § 107' for purposes of liability. . . . "), *petition for cert. filed*, 66 U.S.L.W. 1120 (U.S. Dec. 12, 1997) (No. 97-995); *New Castle County*, 111 F.3d at 1122 (noting that section 113 "confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs].").

Petitioners wrongly imply, however, that the Ninth Circuit rejected this reading of section 107. To the contrary, and as discussed in the Introduction above, the Ninth Circuit concluded that liable parties like Petitioners *do* have a claim arising at least in part under section 107. App. to Pet. for Cert. 8-9.

2. The Court of Appeals' Decision Is Mandated By the Text, Structure and Legislative History of CERCLA, Well-Established Common Law Principles of Joint and Several Liability, and CERCLA's Settlement Provisions.

On the issue fairly presented by this case, which is whether a liable party can recover the entirety of its response costs jointly and severally from other PRPs, section 107 is silent. CERCLA does not describe the nature of the remedy under section 107(a), nor does that section even mention "joint and several liability." The legislative history of this section suggests that Congress knew it had left this issue unresolved and intended the courts to fill the gap by applying common law principles:

> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any

> reference to these terms has been deleted, and the liability of joint tort feasors will be determined under common or previous statutory law.

126 Cong. Rec. S14964 (Dec. 3, 1980) (Statement of Sen. Randolph, sponsor of the bill). Applying common law principles, the courts have found that a non-liable party, such as the government, may seek joint and several liability against a PRP. *See, e.g., United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-69 (CA3 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 171 & n.23 (CA4 1988), *cert. denied*, 490 U.S. 1106 (1989).[4]

The essence of Petitioners' argument is that if a *non-liable party* may bring a claim under section 107(a) for joint and several liability, then the nature of a claim by a *liable party* under section 107(a) also must be for joint and several liability. However, Petitioners' reasoning is demonstrably faulty under both the common law and well-established CERCLA decisional law.

At common law, actions between joint tortfeasors sound strictly in contribution. No liability scheme allows

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[4] The joint and several nature of liability of a wrongdoer under CERCLA section 107(a) was established in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-11 (S.D. Ohio 1983). When CERCLA was amended in 1986, the House report specifically referred to and endorsed the *Chem-Dyne* holding: "nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court." H.R. Rep. No. 99-253(I) at 74, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856; *see United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 & n.19 (CA6 1989) (noting Congressional approval of *Chem-Dyne*), *cert. denied*, 494 U.S. 1057 (1990).

one joint tortfeasor to shift all the liability to others merely because it has incurred expenses in satisfying a common obligation. These fundamental common law concepts are clearly stated by the *Restatement (Second) of Torts* (1965) ("*Restatement*"). Section 433A of the *Restatement* expresses the general rule that in cases involving multiple tortfeasors, each is responsible for its equitable portion of the harm. Where suit is brought by an admittedly liable party, the very rationale for imposing joint and several liability – to promptly make the innocent victim whole in the face of indivisible harm – disappears. *See Restatement* § 433B, cmt. d ("As between the proved tortfeasor who has clearly caused some harm, and the *entirely innocent* plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.") (emphasis added). To impose joint and several liability in cases among liable parties would turn this doctrine on its head. "[W]hen two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 88 (1981).

Petitioners do not and cannot assert that their interpretation of CERCLA sections 107 and 113 would be consistent with the common law, and nothing in the text or legislative history of the act suggests that Congress intended to create new joint and several claims among joint tortfeasors. Thus, the Ninth Circuit was simply applying basic common law principles, as Congress

intended, when it held that a liable party suing under section 107(a) is limited to a claim for contribution.

Petitioners' simplistic syllogism – that if a non-liable party's claim under section 107(a) is for joint and several liability, then a claim by liable parties like Petitioners under the same section must be for joint and several liability – also is wrong under well-established decisional law. When CERCLA was first enacted, it contained no express right of contribution among PRPs. Nonetheless, most courts found by applying common law principles that a contribution remedy for several liability was available under section 107. *E.g., Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985).

In 1986, as part of the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), Congress added section 113(f)(1), which expressly provides for this contribution remedy: "Any person may seek contribution from any other person who is liable or potentially liable. . . . " 42 U.S.C. § 9613(f)(1) (1994). It is axiomatic that when Congress creates an express remedy for a certain class of claims, as it did in section 113, claims that fall squarely within the parameters of that remedy are governed by it.[5] Thus, now that

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[5] *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973) (holding that *habeas corpus*, and not 42 U.S.C. § 1983, is the appropriate remedy for state prisoners attacking the validity or length of their confinement, and that plaintiffs could not escape that fact "by the simple expedient of putting a different label on their pleadings"); *Great Am. Fed. Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-77 (1979) (rejecting plaintiff's attempt

Congress has expressly incorporated a right of contribution into CERCLA, liable parties cannot avoid that remedy by attempting to plead a joint and several claim under section 107(a).

The settlement provisions of CERCLA also provide strong evidence that all six circuits to have addressed the issue are correct in holding that admittedly liable parties are limited to a contribution remedy against other PRPs. CERCLA section 113(f)(2) protects a settling party from "contribution" claims brought by other liable parties. This protection would be hollow indeed if liable parties could sidestep the statute by asserting claims against settling parties for joint and several recovery instead of contribution. *See United Tech. Corp.*, 33 F.3d at 103; *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996).

3. The Court of Appeals' Decision Is Consistent With This Court's Statements in *Key Tronic*.

As the Ninth Circuit recognized, its holding comports with this Court's decision in *Key Tronic*. App. to Pet. for Cert. 8. There, this Court stated that a contribution remedy is indeed part of section 107(a) and that this

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to assert rights created by Title VII within the remedial framework of 42 U.S.C. § 1985(3): "If a violation of Title VII could be asserted through section 1985(3), a complainant could avoid most if not all of the . . . detailed and specific provisions of [Title VII]"); *Block v. North Dakota*, 461 U.S. 273, 285 (1983) (regardless of against whom an action is asserted or how it is described, any action challenging the United States' title to real property falls under the Quiet Title Act).

remedy overlaps with the contribution remedy now expressly provided in section 113:

> The 1986 SARA amendments included a provision – CERCLA § 113(f) – that expressly created a cause of action for contribution. *See* 42 U.S.C. § 9613(f). Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action [for contribution] under § 107 by presupposing that such an action existed. . . . Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

511 U.S. at 816. *Key Tronic* confirms that suits under section 107(a) may be for several liability. *See, e.g., id.* at 809, 814-15 & 816 n.7. Thus, *Key Tronic* demonstrates that Petitioners are wrong in assuming that any claim brought under section 107 necessarily must be for joint and several liability.

4. The Court of Appeals Correctly Refused to Base Its Decision on Policy Considerations Which, If Relevant, Provide Additional Support for the Court's Holding.

The interpretation of CERCLA that Petitioners urge also would be contrary to sound public policy. Both in the district court and before the Ninth Circuit, Petitioners' principal argument was based on policy: it maintained that permitting a liable party to maintain an action for joint and several recovery would encourage early cleanups by allowing liable parties that incur costs – no

matter how responsible they may be for the contamination of a site – to shift those costs to other PRPs. The district court adopted this argument in substantial part. App. to Pet. for Cert. 38-42. On appeal, however, the United States appeared as *amicus curiae* and opposed this result-oriented approach to the construction of section 107. *See* U.S. Dept. of Justice Br. 42 ("Indeed, giving private parties the strong litigation weapon of joint and several liability is not necessary to encourage 'voluntary' cleanups."). The Ninth Circuit properly rejected this method of statutory construction as well:

> [Petitioners] contend[ ] that our holding would hamper CERCLA's policy of promoting rapid and voluntary environmental responses by private parties to the threat posed by hazardous waste sites. We reject this argument because it is based on policy considerations which we cannot consider in light of the controlling text, structure, and logic of CERCLA and of our own precedent in *Dant & Russell*.
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> In any event, we are not convinced that the policy of promoting rapid voluntary cleanups would be undermined to any significant degree by our holding. As discussed above, courts may take into account the degree of cooperation shown by a PRP when equitably allocating liability among PRPs under § 113(f)(1).

App. to Pet. for Cert. 16.

Petitioners include the current operators of mines within the Site which have admitted their liability for cleanup costs under section 107(a) of CERCLA. App. to Pet. for Cert. 19 n.8. Respondents, on the other hand, are claimed to be liable only for activities which occurred at

least a decade ago and have denied any responsibility for contamination at the Site. Thus, the ongoing operators of the Site seek to impose joint and several liability on companies that have no current connection to the Site.

Petitioners contend that imposing joint and several liability on Respondents would be merely a first step, and that Respondents would have a right to assert counterclaims for contribution to reapportion some of the liability to Petitioners. Pet. 12. However, as the Ninth Circuit noted, any scheme that would permit Petitioners to bring a joint and several claim, subject to the Respondents' contribution claims, would be extremely inefficient and "could result 'in a chain reaction of multiple, and unnecessary lawsuits.' Such a joint and several approach would 'guarantee[ ] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.' " App. to Pet. for Cert. 13 (alteration in original) (citations omitted).

Moreover, this argument is disingenuous. Petitioners have reached a settlement with the State of Arizona and have filed a proposed consent decree. *Arizona ex rel. Russell F. Rhoades v. Cyprus Miami Mining Corp.*, No. CIV97-1789 PHX SMM (D. Ariz. filed Aug. 22, 1997). That consent decree, if approved, would purport to confer on Petitioners complete immunity from any contribution claims under CERCLA by Respondents. If Respondents are found liable, Petitioners could use their proposed statutory interpretation to attempt to impose on Respondents 100 percent of cleanup costs at the Site. There is no indication that Congress intended such a patently unjust result in this or any other case.

D. Certiorari Should Not Be Granted to Address Hypothetical Conflicts That Are Not Presented by This Record, Such As Purported Conflicts Involving Statutes of Limitations or the Nature of the Claims Available to Settling Parties.

Petitioners concede that each of the six courts of appeals that has considered the matter has agreed that a liable party may sue other PRPs only for contribution. Pet. 13-14. They argue, however, that differences in the reasoning employed by these courts – *i.e.*, whether the cause of action for contribution arises exclusively under section 107(a), exclusively under section 113(f), or under both – entails a conflict warranting this Court's review. Pet. 14-20. In the style of a law review article, Petitioners chronicle a variety of conflicts that might arise in the future between the Ninth Circuit and other courts of appeals. Certiorari should be denied here because there is no conflict on any issue actually presented by the holding in this case.

First, Petitioners suggest (Pet. 15-17) that the circuit courts have reached differing conclusions concerning the statute of limitations governing a claim by one PRP against another, depending on whether that claim is held to arise under section 113 or section 107.[6] Because no

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[6] The three-year statute of limitations set forth in CERCLA section 113(g)(3), 42 U.S.C. § 9613(g)(3), applies to an "action for contribution for any response costs[.]" The six-year statute of limitations set forth in CERCLA section 113(g)(2), 42 U.S.C. § 9613(g)(2), applies to an "initial action for recovery of the costs referred to in [section 107.]" (Text of statutes reprinted at App. to Pet. for Cert. 72-73.) Both statutory sections provide a variety of different events that can trigger the running of the statutory periods.

statute of limitations issue was raised in this case, the Ninth Circuit properly refused Petitioners' request to consider and decide this issue:

> No statute of limitations issue is before us in this case and we decline the Pinal Group's invitation to opine on it indirectly. . . . The court directly faced with the issue must determine whether § 113(g)(3), § 113(g)(2), or some other statute should apply.

App. to Pet. for Cert. 17. This Court should decline certiorari for the same reason.

Similarly, Petitioners suggest that certiorari should be granted to determine whether a liable party that settles with the government and receives "contribution protection" under section 113(f)(2) nonetheless could be subject to a claim by another PRP under section 107(a). Pet. at 17. Although it is theoretically possible, in light of the recently-lodged consent decree, that this issue might subsequently arise in this case, it was not an issue presented to the district court or the Ninth Circuit.

Petitioners next argue that the Seventh Circuit's decision in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (CA7 1997), raises a conflict with other circuits by suggesting that a "blameless" landowner might be able to pursue a claim against other PRPs for joint and several liability. Pet. 18-20. However, "the Pinal Group acknowledges explicitly that it is partly responsible for the cleanup costs incurred by it." App. to Pet. for Cert. 19 n.8. Thus, Petitioners are not blameless, and any conflict that they claim exists has no relevance here. The Ninth Circuit specifically declined to review this issue, and it is not properly presented for review by this Court. App. to

Pet. for Cert. 14 n.5 ("Because the Pinal Group consists of parties who are admittedly partly responsible for the contamination at issue here, [the *Rumpke*] exception would not apply to this case. We, therefore, do not reach that issue.").

Finally, Petitioners suggest that there is doubt concerning whether a liable party may obtain declaratory relief or prejudgment interest under section 107. Pet. 17-18. These issues were not addressed either by the district court or by the Ninth Circuit.

Because these issues are not presented by this case and were not decided by the courts below, none of these issues "properly would be before the Court if certiorari were granted." S. Ct. Rule 15.1; *see McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16, 16 (1971) (dismissing writ as improvidently granted where "[f]uller examination of the case on oral argument discloses that the record does not adequately present" the question on which certiorari was granted).

E. The Court Should Not Grant This Petition Because the Judgment Before the Court Is Interlocutory, and This Case Is Not Ripe for Certiorari Review.

This case is still far from trial, and the decision below was based solely on the pleadings. As the case develops, claims now pending in the case may be resolved in a manner that will render any decision rendered by the Court purely advisory. First, the Respondents may not be found liable under CERCLA. Second, some or all of the liability which Petitioners seek to shift to the Respondents ultimately may fall back upon Petitioners under the

Respondents' contractual indemnity claims. Third, if the proposed consent decree is approved, Petitioners' claims will be governed by an entirely different section of CERCLA, section 113(f)(3) (which defines the rights of a settling party), rather than CERCLA sections 107(a) and 113(f)(1), which Petitioners request the Court to construe. As a result, this case no longer would be governed by the statutory sections discussed in the Petition.

The possible resolution of this case on grounds other than those presented to the Ninth Circuit demonstrates precisely why, on several occasions, this Court has stated its reluctance to grant certiorari to review cases that are in an interlocutory posture. *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (observing that certiorari to review an interlocutory order will be denied "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."). Petitioners' reliance on issues that are, on the present state of the record, wholly hypothetical, further demonstrates that this case is not ripe for certiorari review.

CONCLUSION

For these reasons, Respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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January 12, 1998

APPENDIX 1

ADDENDUM TO STATEMENT REQUIRED BY RULE 29.6

Corporate Entities In Which Respondent Atlantic Richfield Company Holds Equity Interests

Agro Internacional, S. de R.L. de C.V.
Alpine Pipelines Company
Alyeska Pipeline Service Company
AM/PM Japan Ltd.
ARCO Solar Nigeria, Ltd.

Badger Lake Pipe Line Company
Black Lake Pipeline Company
Blair Athol Joint Venture
Border Pipe Line Company

Candelaris Exploration Corporation
Casitas Pipeline Company
Chartwin Enterprises Limited
China Coal Bed Methane Ltd.
Clermont Joint Venture
Coal Resources of Queensland Pty. Ltd.
Compania de Petrolea Ganso Azul, Ltda
Compania Mexicana de Petroleo El Charro S.A.
Compania Petrolera Carco
Cook Inlet Pipe Line Company
Curragh Coal Sales Co., Pty. Ltd.
Curragh Queensland Mining, Limited
Cuyama Pipeline Company

Delta Housing Inc.
Dixie Pipeline Company
Dos Pueblos Golf Links I-V, Ltd.

East Texas Salt Water Disposal Company
El-Biar Real Estate Holdings, Inc.
EnArco Resin S.p.A.
Eurogen C.V.

F & H Pipeline Company
Gordonstone Coal Management Pty., Ltd.
Gordonstone Coal Sales Pty., Ltd.
Grant Gathering Company
Greater Pacific Limited
Guangzhou Wittenberg Oil Co. Ltd.
Gulfstream Sinclair Joint Venture Co. Limited

HAB Assets, Inc.
Hutzhou Wittenberg Petroleum Supply Co. Ltd.

Inversiones ARCO. S. DE R.L. DE CV.

Jiu Feng ARCO Shipping Company, Ltd.
JSC Oil Company LUKOIL

Kuparuk Pipeline Company
Kuparuk Transportation Company
Kuparuk Transportation Capital Corporation

Little Thunder Leasing Company
Los Angeles Export Terminal, Inc.
Los Patacios Exploration Corporation
LUKARCO B.V.
LUKARCO Finance B.V.
LUKARCO Limited
LUKARCO Services B.V.
LUKOIL

Mountain Coal Company

New Cure, Inc.
Nihon Oxirane Co., Ltd.

Oliktok Pipeline Company
Olympic Pipeline Company
Orinoco Joint Venture
Oxirane Chemical Company

Pan American Petroleum Company of California
PayPoint Electronic Payment Systems, Inc.
Portview International Ltd.

POSM Delaware, Inc.
POSM II Limited Partnership, L.P.
POSM II Properties Partnership, L.P.
Prestige Stations, Inc.
Prince William Sound Oil Spill Response Corporation
Products Cogeneration Company
P.T. ARCO Chemical Indonesia

Rodas Exploration Corporation

Santa Cruz Exploration Corporation
Seaway Pipeline Company
Shine Top International Investment Limited
Silva Exploration Corporation
South Kerkennah Oil Company
Streamelec B.V.

Tertiary Services, Inc.
Texas-New Mexicc Pipe Line Company
The Counsel for Environmentally Sound Deicing, Inc.
The Meadows Corporation
Thunder Basin Coal Company, L.L.C.
Thunder Basin Coal Holdings, Inc.
Tricentrol

Val Verde Pipeline, L.P.
Vastar Gas Marketing, Inc.
Vastar Holdings, Inc.
Vastar Power Marketing, Inc.
Ventway Pty., Ltd.

Wallani Pty., Ltd.
Western Energy Cogen, Inc.
Wilburton Hub, Inc.
Wittenberg (Hong Kong) Ltd.
Wittenberg Investments Ltd.

Zhenhai Refining and Chemical Company

No. 97-795

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF ALABAMA, ARIZONA, ARKANSAS, GEORGIA, MISSOURI, OHIO, OKLAHOMA, TENNESSEE, VERMONT, VIRGINIA, WEST VIRGINIA, THE CITIES OF PHOENIX, SCOTTSDALE, TEMPE AND TUCSON, ARIZONA, THE CITY OF CINCINNATI, OHIO, THE CITY OF FRESNO, CALIFORNIA, AND THE CITY OF SEATTLE, WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether courts must apply the plain language that Congress used in Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), allowing "any other person" to recover from other liable parties the necessary costs expended in cleaning up sites contaminated by hazardous substances, or whether courts may read into the statute the additional requirement that only "any innocent person" – that is, one who is not liable for any of the contamination – may proceed under Section 107(a) to recover such costs?

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INTERESTS OF THE AMICI CURIAE

The States of Alabama, Arizona, Arkansas, Georgia, Missouri, Ohio, Oklahoma, Tennessee, Vermont, Virginia, West Virginia, the Cities of Phoenix, Scottsdale, Tempe and Tucson, Arizona, the City of Cincinnati, Ohio, the City of Fresno, California, and the City of Seattle, Washington (collectively, the "States and Cities") share substantial interests in the cleaning up of the environment and, hence, preserving the nation's ability to remediate sites contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (commonly known as Superfund). While most States have adopted parallel statutes, CERCLA's strict, joint, several and retroactive liability scheme typically makes it the favored vehicle for governments and private parties seeking to obtain funds for cleanup from those responsible. The amici represent the public interest in remediating the overwhelming number of contaminated sites, many polluted years or decades ago by numerous parties. Given the limited public enforcement resources available to address them, the plain language of the Superfund law must not be disregarded in favor of an interpretation that discourages liable private parties from undertaking remedial action. The decision of the United States Court of Appeals for the Ninth Circuit at issue does precisely that.

The legacy of past hazardous waste disposal practices has left the nation with some 40,000 sites actively being addressed by the United States Environmental Protection Agency ("U.S. EPA"), the States, and municipal governments. *See* U.S. EPA, "Setting the Record Straight" (Office of Solid Waste and Emergency Response, April 3,

1995). Beyond that, there may be as many as 400,000 additional contaminated sites, meaning that government enforcement cannot be awaited at all of them. *See* Office of Technology Assessment, "State of the State on Brownfields: Programs for Cleanup and Reuse of Contaminated Sites," OTA-BP-ETI-153 (June 1995), p. 2 (contaminated sites in United States may number 450,000); *see also* National Research Council, *Alternatives for Ground Water Cleanup* 27 (Nat'l Acad. Press. 1994) (number of sites where ground water may be contaminated ranges between 300,000 to 400,000). U.S. EPA generally takes enforcement action only with respect to the 1,204 sites on the agency's National Priorities List. *See* "National Priorities List for Uncontrolled Hazardous Waste Sites," 62 Fed. Reg. 50442 (Sept. 25, 1997) (to be codified at 40 C.F.R. Part 300, Appendix B); 40 C.F.R. § 300.425(b)(1). That leaves the bulk of the cleanup task for the States and municipalities, including the amici, and willing private parties. States and cities, unlike the federal government, must do so without the benefit of the federal Hazardous Substance Trust Fund (the "Superfund" which U.S. EPA uses as a revolving enforcement fund) and without the ability to unilaterally order private parties to conduct CERCLA cleanups. *See* 42 U.S.C. §§ 9611 (establishing tax on petroleum and certain feedstock chemicals) and 9606(a) (allowing U.S. EPA to issue unilateral cleanup orders not subject to pre-enforcement review); *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1494 (10th Cir. 1990) (injunctive relief under Section 106 is not available to States), *cert. denied*, 499 U.S. 960 (1991). *See also* Milton Russell, et al., "Hazardous Waste Remediation: The Task Ahead," (Univ. of Tenn. 1991) (over next 30 years, nation likely will

spend $480 billion to $1 trillion, with "best guess" of $750 billion, to clean up ground water contamination). Fiscal realities accordingly force the States and Cities to rely upon private parties to conduct the majority of the cleanup of these sites. Usually, potentially responsible parties ("PRPs") conduct cleanup at a site and then seek to recover the necessary costs incurred from other PRPs who did not perform any cleanup in a CERCLA action. Therefore, ensuring that CERCLA provides incentives to a liable but working party to conduct cleanups is of vital importance to the States and Cities.

The Ninth Circuit's decision limits PRPs to pursuing contribution actions under CERCLA Section 113, thus frustrating one of CERCLA's overarching goals – promoting prompt voluntary cleanups by private parties. Absent the distinct advantages afforded by cost recovery actions under Section 107(a), such as strict, joint and several liability, a shifted burden of proof as to liability allocation, and a longer statute of limitations, PRPs will have no incentive to come forward, settle their liability, and undertake costly remedial activities. This is of grave concern to the States and Cities.

The States and Cities also have an interest in ensuring that CERCLA is enforced uniformly across the nation. The current judicial conflict regarding whether a PRP may proceed under Section 107(a) renders the law unstable and unpredictable. This split of authority and the unpredictability it fosters makes it unlikely that PRPs will initiate cleanups voluntarily and, additionally, could lead PRPs that have begun cleanups to stop their work.

REASONS FOR GRANTING THE PETITION

The Pinal Creek Group's Petition seeks resolution of the conflict in the federal courts regarding the nature of the cost recovery claim that liable parties who conduct remediation ("Working PRPs") may bring under CERCLA. Some courts allow liable parties who perform cleanup work to seek cost recovery from other PRPs pursuant to Section 107(a), 42 U.S.C. § 9607(a), for those out-of-pocket response costs. Other courts limit PRPs to seeking contribution pursuant to Section 113(f), 42 U.S.C. § 9613(f), just like those who have been ordered to reimburse another party that has directly incurred cleanup costs. This split of authority and the unpredictability of what will happen when millions of dollars have been spent by Working PRPs in reliance on the federal statute make it unlikely that PRPs will initiate cleanups voluntarily. Additionally, Working PRPs that have started cleanup work at a site might choose to stop these cleanup efforts in light of the uncertainty of the law.

The plain language and structure of CERCLA, coupled with the statute's policies encouraging early settlements and voluntary cleanups by private parties, compel a determination that PRPs who incur response costs – that is, expend resources conducting the actual cleanup activities – should be allowed to seek recovery of those costs under Section 107(a). In point of fact, this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), while not explicitly addressing this issue, applied the plain language of Section 107(a) and permitted a Working PRP to assert a cost recovery claim for its necessary costs of response. The Ninth Circuit, however, disregarded CERCLA's plain language and the clear

implications of the *Key Tronic* decision by imposing unnecessary and counterproductive constraints on Working PRPs. Unless this Court makes clear that Working PRPs may pursue cost recovery under Section 107(a), the Superfund program will be crippled by the loss of significant incentives to voluntary remediation, leaving the States and Cities with an insurmountable cleanup burden. The singular importance of this issue to the future of this nation's ability to address the tens of thousands of sites contaminated by hazardous substances, and the need to clarify the *Key Tronic* decision to meet that challenge, merit granting the Petition for a Writ of Certiorari. *Cf. Securities and Exchange Comm'n v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967) (certiorari granted to address important issue and to clarify prior decision); *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231, 234 (1951) (certiorari granted to decide important statutory issue not settled by this Court).

I. CERCLA's Plain Language, Structure, and Policy Support a Working PRP's Use of Section 107(a).

A. The Plain Language of CERCLA.

Previously, the Ninth Circuit has properly noted that a court should follow the plain language of Section 107 rather than adopt "an interpretation of CERCLA that would create a significant obstacle to private response actions not contemplated by Congress." *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 695 (9th Cir. 1988). Inexplicably, the Ninth Circuit failed to heed its own instruction in the ruling below.

It is well-established that CERCLA Section 107(a) generally imposes strict, joint, and several liability upon four classes of responsible parties. 42 U.S.C. § 9607(a); *3550 Stevens Creek Assocs. v. Barclays Bank of Calif.*, 915 F.2d 1355, 1357 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986). With respect to most governmental plaintiffs, this liability is for "all costs" of response "not inconsistent with the National Contingency Plan" (the CERCLA cleanup blueprint found at 40 C.F.R. Part 300). 42 U.S.C. § 9607(a)(4)(A). With respect to private parties and local governments, this liability is for "any other necessary costs of response incurred by *any other person* consistent with the National Contingency Plan," 42 U.S.C. § 9607(a)(4)(B) (emphasis added). This provision "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Key Tronic*, 511 U.S. at 818.

Nothing in Section 107(a)'s plain language precludes its use by liable parties who actually incur response costs. Indeed, it is the modifying phrase "costs of response incurred" that defines a private party's right to bring a cost recovery action. It is not, as has been argued, the imagined and judicially engrafted modifier "innocent," as in "any other [innocent] person," which determines private-party standing under Section 107(a). Congress could easily have limited the action to "innocent" persons, but it did not.[1] *Cf. Idylwoods Assocs. v. Mader Capital, Inc.*, 915

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[1] Elsewhere in the statute, Congress did choose to distinguish between liable and "innocent" parties. Section 101(f) of the Superfund Amendments and Reauthorization Act

F. Supp. 1290, 1313 (W.D.N.Y. 1996) ("If, when Congress recognized contribution as an available remedy in CERCLA actions, it wished to require a PRP to utilize only § 113 in seeking reimbursement of response costs, it could easily have said so.").

A review of the other provisions of Section 107 also precludes courts from inserting the term "innocent" into Section 107(a)(4)(B). Neither subsection (a)(4)(A) (which creates federal, state and tribal governmental standing) nor subsection (b) (which enumerates the defenses to subsection (a) liability), makes any distinction between innocent and non-innocent plaintiffs. In fact, with respect to defenses, courts have consistently rejected those alleging a plaintiff's liability status as being beyond the scope of the enumerated defenses in Section 107(b). *E.g., General Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990) ("CERCLA does not provide for an 'unclean hands' defense"), *cert. denied*, 499 U.S. 937 (1991). The only distinction drawn between private parties in Section 107(a) is between those who have incurred response costs and those who have not.

Moreover, nothing in the plain language of Section 113 prohibits Working PRPs that have incurred response costs from asserting claims under Section 107(a). For

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("SARA"), Pub.L. 99-499, 100 Stat. 1613, codified at 42 U.S.C. § 9601(35), introduced the "innocent landowner" defense to CERCLA liability. This provision operates in concert with CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3), one of the enumerated defenses to Section 107(a) liability. Congress' particularized focus on the "innocence" of certain landowner parties indicates that it was aware of the distinction and did not intend it to be imported into the other provisions of Section 107.

example, nowhere in the text of Section 113(f) did Congress express any intention that contribution actions would be the exclusive reimbursement remedy for PRPs. *See, e.g., Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995).

Additionally, Section 113(g), which sets forth the differing statutes of limitations applicable to Sections 107(a) and 113(f), actually favors an interpretation of the statute permitting Working PRPs to bring cost recovery actions. The three-year limitations period for contribution actions runs from the date of a judgment, an administrative order, or entry of a judicially-approved settlement concerning costs or damages. *See* Section 113(g)(3). Conversely, the six-year limitations period for cost recovery under Section 107(a) begins after "initiation of physical on-site construction of the remedial action." *See* Section 113(g)(2). Limiting PRPs who *voluntarily* initiate and carry out cleanups to contribution actions under Section 113(f) would create the truly odd situation where there is no applicable statute of limitations, a result Congress could not logically have intended. *See, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) (in interpreting statutes, "absurd results are to be avoided"); *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995) (courts do not presume Congress intended statute to have an absurd result). Only by interpreting CERCLA to allow Working PRPs to bring cost recovery actions under Section 107(a), subject to the six-year statute of limitations under Section 113(g)(2), can one avoid this absurd outcome, while giving meaning to the statute's express terms.

CERCLA's legislative history also supports the view that Congress did not intend to prohibit PRPs from using Section 107(a). In adopting the section, Congress stated that, among other objectives, the 1980 CERCLA provisions "would also establish a federal cause of action in strict liability . . . to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H. Rep. No. 1016, 96th Cong., 2d Sess., at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. Prior to the enactment of SARA, the right of action given to working parties under Section 107 was clear enough. Less certain then was whether contribution was available to non-working parties who litigated and lost claims brought by others who had conducted cleanup. *Burlington Northern R.R. Co. v. Time Oil Co.*, 738 F. Supp. 1339, 1341 (W.D. Wash. 1990). In these circumstances, of course, payments made to satisfy judgments or otherwise resolve liability did not appear to constitute direct incurrence of response costs within the meaning of Section 107(a)(4)(B). To ameliorate any harsh consequences that might result, most pre-SARA courts found that non-working defendants in a cost recovery action nonetheless could obtain contribution, because such a right was implied in the legislative history of CERCLA and in CERCLA Section 107(e)(2), which preserves causes of action available "by subrogation or otherwise." 42 U.S.C. § 9607(e)(2). *See, e.g., Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (cross-claim for contribution for any amounts found to be due to plaintiff is implicitly recognized in Section 107(e)(2) and the legislative history of CERCLA); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.

Supp. 984, 995 (D.S.C. 1984) (right of contribution implied from common law principles and Section 107(e)(2)).

Congress attempted to remedy this confusion in SARA by, among other things, adding an express right of contribution for liable parties – Section 113(f)(2). That Section provides that a "person who has resolved its liability to the United States . . . *may* seek contribution" from non-settling PRPs. 42 U.S.C. § 9613(f)(3)(B) (emphasis added). Section 113(f) of SARA thus clarified the right to contribution of PRPs who had not themselves incurred response costs, but who had paid the government or another party for response costs incurred. In short, Section 113 was added to provide a modest remedy for the recalcitrant. However, nowhere in Section 113 did Congress ever express an intent to make Section 113(f) the exclusive reimbursement remedy for Working PRPs.

B. CERCLA's Structure and Policies.

Even if the plain language did not so clearly allow a Working PRP to employ Section 107, any interpretation of CERCLA limiting Working PRPs to contribution actions under Section 113(f) would violate the framework of the statute and its underlying policies, which encourage settlements and create incentives for voluntary cleanups by threatening non-working parties with disproportionate liability. *See, e.g.*, 42 U.S.C. § 9613(f)(2); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 91 (1st Cir. 1990) ("Congress explicitly created a statutory framework that left non-settlors at risk of bearing a disproportionate amount of liability"); *Arizona v. Nucor Corp.*, 825 F. Supp. 1452, 1463 (D. Ariz. 1992) (adopting *Cannons*), *aff'd*, 66 F.3d 213

(9th Cir. 1995). Precluding working parties from employing Section 107(a) would get it precisely backwards, by threatening *settlors* with disproportionate liability and creating an incentive to be the last holdout. As the District Court below correctly noted, loss of the threat of joint and several liability and other statutory incentives under Section 107(a) would be "at war with CERCLA policy, because Plaintiffs would be less likely to voluntarily perform a lengthy and costly cleanup if the prospect of recovering their costs is remote and expensive." *The Pinal Creek Group v. Newmont Mining Corp., et al.*, 926 F. Supp. 1400, 1408 (D. Ariz. 1996) (Petition at App. 40), *rev'd*, 118 F.3d 1298 (9th Cir. 1997).

The District Court's ruling eloquently described the CERCLA policies that support allowing a Working PRP to proceed under Section 107(a). *See* Petition at App. 38-40. "Courts have characterized CERCLA's goals as two-fold: encouraging the prompt and voluntary cleanup of hazardous wastes; and imposing the costs of cleanup on responsible parties." *Id.* at App. 38. Allowing Working PRPs to proceed against recalcitrant PRPs under Section 107(a) encourages these twin goals by creating several incentives. As Judge Silver explained:

> These incentives include: (1) shifting the difficult burden of proof concerning the allocation of cleanup costs from plaintiffs to defendants; (2) relieving plaintiffs of the risk of being held liable for "orphan shares" – cleanup costs that would otherwise be charged to insolvent or absent parties; (3) minimizing plaintiffs' transaction costs involved in tracking down and suing every PRP; (4) limiting the range of available defenses to those enumerated in Section

> 107(b);[2] and (5) giving parties who initiate cleanups the benefit of a longer statute of limitations.

Id. at App. 39. If working PRPs are limited to a contribution action under Section 113, the Working PRPs

> would bear the burden of proving that they had assumed more than their fair share of cleanup costs[,] . . . might have to track down and sue every [recalcitrant PRP], incurring considerable transaction costs[,] . . . risk being stuck with cleanup cost shares attributable to absent or insolvent parties[,] . . . [and] would not be able to wield the threat of disproportionate liablity against Defendants to encourage early settlement.

Id. at App. 40. In short, if Working PRPs were limited to a contribution action under Section 113, the "foregoing incentive scheme would be turned on its head." *Id.*

Private parties who come forward, enter settlements,[3] conduct cleanups, and then seek to recover their

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[2] These statutory defenses are that the release or threat of a release of hazardous substances from a facility was caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party, other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship with the defendant. 42 U.S.C. § 9607(b)(1)-(3).

[3] Many voluntary CERCLA settlements are ultimately embodied in a consent decree for administrative purposes. Typically, this involves concurrently filing a complaint against a settling party and a consent decree resolving all claims in the complaint. *See, e.g., Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 763 (7th Cir. 1994); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141,

costs from recalcitrant PRPs must be rewarded for their willingness to undertake and fund remedial actions. By no means should they suffer greater exposure and higher risk than PRPs that do nothing and wait to be sued. *Cf. Price v. U.S. Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994) ("CERCLA was enacted to facilitate the cleanup of environmental contamination by hazardous waste releases. . . . CERCLA employs several mechanisms to further this purpose. One of those mechanisms is a private action for recovery of response costs"); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir.) (purpose of private cost recovery under Section 107(a) is to encourage private cleanup), *cert. denied*, 506 U.S. 940 (1992).

The Ninth Circuit's decision to deprive Working PRPs of these advantages is wrong, unfair, and contrary to public policy. A Working PRP that initiates and conducts a cleanup must be allowed to seek recovery of its "necessary costs of response" under Section 107(a). Concurrently, it should be able to assert a separate action under Section 113(f) with respect to payments it made to third parties to resolve liability for response costs incurred by others, including the government. Nonworking PRPs can, should, and *do* assert contribution counterclaims to ensure that the Working PRP does not avoid paying its equitable share of the cleanup costs. In other words, Working PRPs are entitled to use Sections

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143 (D. Ariz. 1991). Whether a PRP can proceed under Section 107 obviously should not be contingent upon whether it has engaged in this largely mechanical process, but rather on whether it has actually spent money on response activities.

107 and 113; non-working parties then may invoke Section 113. As Judge Silver explained in her opinion below, this "two-step framework" creates significant incentives for PRPs to voluntarily conduct cleanups, while ensuring that all responsible parties bear their fair share of the costs. *See The Pinal Creek Group*, 926 F. Supp. at 1407 (Petition at App. 38-39). Among other things, this process properly places the burden of proving equity on the party that has *refused* to spend its own money to remediate environmental harms that it, at least in part, is responsible for causing. As previously noted, this Court's opinion in *Key Tronic* confirms the correctness of this analysis. *See* 511 U.S. at 820-21 (noting that Key Tronic had asserted a claim under Section 107(a) to recover certain response costs incurred in searching for other PRPs and asserted a contribution claim under Section 113 to recover a portion of money repaid to the government).

The Ninth Circuit's decision limiting Working PRPs to assert only contribution actions embraces two ill-founded and overlapping assumptions: first, that all PRPs, whether working or recalcitrant, stand on equal legal footing within the context of CERCLA; and second, based on that assumed legal parity, that any causes of action between PRPs are, by definition, contribution actions. The former assumption disregards the clear distinction in Section 107(a)(4)(B) between working and non-working parties (i.e., between those who incur "necessary costs of response" and those who, at some later date, merely reimburse another for an equitable share of the cleanup cost). The latter assumption compounds the error by erroneously interpreting the Section 113(f) cause of action as one between joint tortfeasors subject to the

common-law rules of contribution expressed in the Restatement (Second) of Torts Section 886A(1). Such a misinterpretation fails to recognize that, in enacting Section 113 in 1986 as part of SARA Congress intended merely to "clarify and confirm" the pre-SARA case law which "recognized the right of culpable private parties to obtain *indemnification* and/or contribution from recalcitrant parties for remediation costs." *The Pinal Creek Group*, 926 F. Supp. at 1410 (Petition at App. 45) (emphasis in original).

The Ninth Circuit's decision likewise is premised upon the assumption that Congress set out to create the Section 107(a) cause of action for a small universe of parties – those who fell outside CERCLA's broad liability scheme, but who nevertheless undertake cleanup – rather than the significantly larger universe of liable but working parties. Given a statutory scheme that enumerates three exclusive defenses – two of which have never succeeded on the merits in a reported decision – that is a quixotic assumption indeed.[4]

Similarly unfounded is the concern that allowing PRPs to assert claims under Section 107(a) would permit an "end-run" around the contribution protection (immunity from civil claims) afforded by Section 113(f)(2).

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[4] Liability to the government for persons who fall under CERCLA Section 107(a) generally is subject only to the enumerated defenses of Section 107(b). *See* 42 U.S.C. § 9607(a) (liability is "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)"); *Levin Metals*, 799 F.2d at 1316-17. Neither the "act of God" nor the "act of war" defense has succeeded on the merits.

Under Section 113(f)(2), contribution protection applies to "matters addressed" by a settlement agreement and is unaffected by the label a plaintiff attaches to its claim against a settling party. The States and Cities are confident in the ability of the courts to recognize and prevent attempts to "end-run" CERCLA's contribution protection provisions. *See, e.g., Cannons Eng'g*, 899 F.2d at 92-93 (no equitable indemnity claim may be asserted against a party to a judicially approved CERCLA settlement); *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1495-97 (S.D. Ohio 1991) (indemnity claim prohibited as disguised contribution claim).

II. The Ninth Circuit Decided an Important Federal Question in Conflict with This Court's Opinion in *Key Tronic v. United States*.

Permitting Working PRPs to assert cost recovery actions under Section 107(a) is also in keeping with and further bolstered by this Court's opinion in *Key Tronic Corporation v. United States*, 511 U.S. 809 (1994). Key Tronic Corporation was a PRP that incurred $1.2 million in response costs (in the form of attorney's fees) of its own and also made a $4.2 million payment to the government in settlement of an enforcement proceeding. *Id.* at 812. Thereafter, Key Tronic brought a Section 107 claim to recover its $1.2 million out-of-pocket response costs *and* a Section 113 claim for contribution. 42 U.S.C. §§ 9607 and 9613. While noting that Key Tronic was "responsible for contaminating a landfill" and had entered into a prior consent decree, *id.* at 811, this Court nevertheless endorsed Key Tronic's use of Section 107(a) to recover certain of its out-of-pocket response costs incurred in

searching for other liable parties. *Id.* at 820-21. (Some of the fees were judged to be outside the scope of "necessary" costs of response.) The Court also noted that Key Tronic was limited to proceeding under Section 113 to the extent it had sought contribution to recover part of its monetary payment to the government. *Id.* at 812. In short, Key Tronic proceeded, with this Court's endorsement, as follows: under Section 107 with respect to its out-of-pocket "necessary costs of response," and under Section 113 with respect to its payment to resolve liability for others' response costs. This dual approach by Key Tronic is precisely what Congress intended should occur, what the plain-language of CERCLA provides, and what the District Court below decided.

In *Key Tronic*, this Court clearly decided that a PRP plaintiff could recover its response costs under "§ 107, which impliedly authorizes private parties to recover cleanup costs from other PRP's." *Id.* at 818. The Court also rejected the contention that SARA's 1986 addition of an express right of contribution preempted the right of action under Section 107 created in 1980:

> [T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a *similar and somewhat overlapping* remedy in § 107.

Id. at 816 (emphasis added). The dissenting opinion in *Key Tronic* also agreed that Section 107(a) authorized recovery, taking issue only with the majority's characterization of a PRP's right as "implied" rather than express. *Id.* at 822.

Unfortunately, the Ninth Circuit ignored the clear implications of the *Key Tronic* decision and adopted an interpretation of CERCLA that violates its plain language, discourages voluntary cleanups by responsible parties, and puts the public at risk of further environmental degradation. By prohibiting Working PRPs from asserting a Section 107(a) cost recovery action against recalcitrant PRPs, the Ninth Circuit has undermined the intent of CERCLA, threatened the continued viability of the Superfund program, and jeopardized the public's ability to achieve a clean environment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 12th day of January, 1998.

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In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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I. Introduction

By granting the Petition, the Court can resolve whether potentially liable parties may state cost recovery claims under the plain language of CERCLA § 107(a), 42 U.S.C. § 9607(a) (1996). Resolving this question would end widespread confusion in the federal courts and would have a controlling legal effect on virtually every CERCLA cost recovery case. Congress intended that privately funded cleanups be the most common cleanups under CERCLA, yet the key statutory incentive to encourage the private spending of literally hundreds of billions of dollars for cleaning abandoned hazardous waste sites is at stake.

As is widely recognized throughout the environmental community, this Petition presents the single most important question in private CERCLA litigation. The Court can decide whether strong private cleanup remedies are statutorily provided, or the Court can allow CERCLA jurisprudence to fracture and languish while critical congressional goals remain frustrated. As explained below, the conflicting interpretations of the courts of appeals have already brought yet another related certiorari petition to this Court – one that simply would not be here if courts followed the plain language of the statute. Many more petitions will be necessary if the issue in this case remains unsettled and the lower courts are thus required to develop new rules under CERCLA necessitated solely by the deviation from the plain statutory language at issue here.

Moreover, the importance of the question presented goes far beyond the interests of the private parties in this litigation. The State of Arizona, joined by the States of Alabama, Arkansas, Georgia, Missouri, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and West Virginia; and the Cities of Phoenix, Scottsdale, Tempe and Tucson, Arizona,

joined by the Cities of Cincinnati, Ohio; Fresno, California; and Seattle, Washington, have briefed the Court regarding the overriding importance of a proper interpretation of CERCLA § 107(a) to the well-being and quality of life in their communities. As the amici curiae stated, unless the Court grants the writ of certiorari and "makes clear that Working PRPs may pursue cost recovery under Section 107(a), the Superfund program will be crippled by the loss of significant incentives to voluntary remediation, leaving the States and Cities with an insurmountable cleanup burden." (Brief for Amicus Curiae in Support of Petition for Writ of Certiorari, *Pinal Creek Group v. Newmont Mining Corp.*, No. 97-795 (U.S. filed Jan. 12, 1998)).[1] For the reasons stated in the amici curiae brief, the current petition and herein, Petitioners respectfully request that the writ of certiorari be issued.

REASONS TO GRANT THE PETITION

A. The Existing Cases Have Created a Genuine Split of Authority Regarding a Legal Question that the Circuits Have Recognized as Needing Urgent Resolution.

The overriding need for a clear answer to the question presented – whether potentially liable parties may state cost recovery claims under CERCLA § 107(a) – has been recognized by each appellate court that has reviewed this issue. In certifying interlocutory appeals on the same purely legal question presented here, the Ninth Circuit – as well as the Sixth Circuit and a certifying district court in the Second Circuit – clearly disagreed with Respondents' suggestion that the law in this area is settled. The courts instead recognized that a prompt resolution of the conflicting interpretations of the question was necessary. *See Pinal Creek Group v. Newmont Mining*

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[1] Many other governments (as well as private parties) will join in supporting Petitioners if certiorari is granted.

Corp., No. 96-80193 (9th Cir. July 15, 1996) (order granting interlocutory appeal); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, No. 96-8342, slip op. at 2 (6th Cir. Feb. 13, 1997) (order granting petition for permission to appeal) (noting that "the district courts in this circuit are divided and the decisions of other circuits are not entirely consistent"); *Cooper Indus., Inc. v. Agway, Inc.*, No. 97CV0748, 1997 U.S. Dist. LEXIS 19192, *20-23 (N.D.N.Y. Nov. 14, 1997) (certifying question presented to the Second Circuit and noting that this issue has generated much discussion). These courts each concluded that they should not delay in providing with a clear answer to the question presented here, and recognized that their interpretation of CERCLA § 107(a) would have a controlling legal effect on CERCLA litigation.

The same considerations underlying the decisions of numerous circuits to review the question presented under 12 U.S.C. § 1292(b) militate heavily in favor of granting the current petition. Where, as here, resolution of a legal issue will have controlling effects on the course of litigation, this Court has recognized that certiorari is warranted. Illustratively, in *Gillispie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Court stated that it had granted the writ of certiorari because the circuit court's interlocutory ruling was "fundamental to the further conduct of the case." *Id.* at 152 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)) (stating that certification of the appeal under § 1292(b) would have rendered the court of appeals' jurisdiction "unquestionably . . . proper" and that the same underlying policies warranted certiorari). This controlling legal effect will be fundamental not just to this case, but also to the hundreds of other CERCLA cases now pending in the federal courts. Thousands more CERCLA cases undoubtedly will be filed relating to the tens of thousands of hazardous waste sites already identified by the federal

government where private funds must provide the majority of the cleanup dollars.

Notwithstanding the federal circuits' recognition of the need to provide litigants with an answer to the question presented, the lower courts have failed to develop a consistent interpretation of the statutory language of CERCLA § 107(a). Instead, as discussed in the petition, the circuits have already developed three distinctly different statutory interpretations. Consequently, the existing split of authority will become only more aggravated as additional circuits endorse one of the existing statutory interpretations or develop additional inconsistent interpretations. No matter how the Sixth Circuit, and perhaps the Second Circuit, ultimately answer the question presented, confusion will continue to abound throughout the remaining federal jurisdictions.

A recently filed petition for certiorari from the Tenth Circuit pointedly demonstrates the existence of both the split of authority and the need for an immediate resolution of this issue. In *Browning-Ferris, Inc. v. Sun Co., Inc,* the defendants have filed a petition for writ of certiorari that raises essentially the same question presented in this case. *See* Petition for Writ of Certiorari for Defendants-Appellants, *Browning-Ferris, Inc. v. Sun Co., Inc.*, (U.S. filed December 12, 1997) (No. 97-995). Both the Browning-Ferris petitioners, who are CERCLA defendants, and Petitioners in this case, who are CERCLA plaintiffs, agree that a split exists between the Ninth Circuit's decision and those of other circuits regarding the proper interpretation of CERCLA § 107(a).[2] Indeed, the Tenth Circuit

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[2] As discussed in the petition, the Seventh Circuit has a unique view that gives rise to a three-way split of authority among the circuits. Under the Seventh Circuit's view, parties who are liable but "blameless" of fault may state claims under CERCLA § 107(a). *See Rumpke of Ind., Inc. v. Cummins Engine Co.,*

petitioners devote much of their petition to bitterly attacking the Ninth Circuit's decision in *this* case.[3]

The circuits, of course, cannot address this problem outside their own geographical jurisdictions and have not provided the uniform answer needed. In light of the existing split of authority, inconsistent application of the same statutory language is thus already assured. Furthermore, both the unequal treatment of potentially liable parties and choice-of-law disputes are inevitable. Unless this Court grants the Petition to resolve the existing split of authority, unfairness and confusion will fester. Given the important and urgent need to have the question presented resolved, certiorari is warranted.

B. The Petition Presents the Ideal Record to Resolve the Existing Split of Authority Because, Uniquely Among the Dozens of Reported or Pending Cases, this Record Directly Implicates the Plain Meaning of "Contribution" in the Language of CERCLA § 113(f).

The record presented by the Petition in this case constitutes a superior record on which to resolve whether potentially liable parties may state claims under CERCLA § 107(a), § 113(f), both sections, or neither section.

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107 F.3d 1235, 1240 (7th Cir. 1997). Petitioners, however, have never had a practical opportunity or reason to allege the facts of their "blamelessness" because the Seventh Circuit's interpretation has never been endorsed or applied in the Ninth Circuit. Accordingly, resolution of the Seventh Circuit's conflict with the Ninth Circuit is critical for petitioners to determine if such allegations are now necessary.

[3] Petitioners respectfully suggest that the Court may find it beneficial and efficient to consider both petitions concurrently. As the Tenth Circuit defendants' petition illustrates, the statute of limitations issue explicitly raised in *Browning-Ferris* is inextricably intertwined with the resolution of the question presented here.

Uniquely among all pending or reported cases to date, the record here would allow the Court to address the situation in which the potentially liable parties' claims do not fall within the traditional definition of "contribution," and therefore do not fall strictly within the plain language of CERCLA § 113(f).

Whereas the literal text of CERCLA § 107(a) creates a cause of action for any person who incurs properly qualified cleanup costs, § 113(f) provides certain parties with a right only to seek "contribution" from other liable parties. 42 U.S.C. § 9613(f) (1996). Congress intended § 113(f) simply to "clarif[y] and emphasize[ ] that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. Rep. No. 99-253 (pt. III), at 18 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3041. Petitioners have not settled with EPA and are not defendants in a CERCLA action in this case, and therefore do not fall into either category of "contribution" plaintiff within the plain meaning of that term. Thus this case's factual record unquestionably implicates the plain meaning of the term "contribution" used in the statutory language.[4]

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[4] The question presented in the petition arises solely in the context of Respondents' motion to dismiss or for judgment on the pleadings, yet Respondents disingenuously attempt to inject entirely speculative matters outside the record as grounds for declining certiorari. In addressing the question presented, the Court properly would ask only whether the facts alleged in the pleadings would state a cause of action under the applicable statute. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (granting certiorari to address question of whether "[t]he allegations of the complaint, if proved, would establish [petitioners' legal claim]").

Under the traditional definition of contribution approved by Congress in drafting CERCLA § 113(f), contribution plaintiffs must have been externally "compelled" to discharge their liability to another party pursuant to a judgment or settlement.[5] Therefore, parties deemed "volunteers," such as the Petitioners here, do not have contribution rights.[6]

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[5] One academic commentation explains how contribution principles apply to CERCLA's basic scheme by using an example in which "A" has conducted a cleanup without an order, jugdgment or settlement:

> To have a cause of action for contribution, A must prove that he discharged the liability to a third party, paid more than his share of the liability, and acted under "compulsion" or legal duty. . . . The problem is that A did not act under compulsion and as a volunteer cannot recover contribution. . . .
>
> Moreover, A had no legal duty under CERCLA to clean up Site X. CERCLA does not obligate anyone to clean up any site. Parties only have an affirmative duty to conduct a cleanup if they are subject to a section 106(a) administrative or judicial order, if they have entered into a consent decree obligating them to clean up the site, or if some other law requires them to do so. Because this cleanup was undertaken voluntarily, A was under no such compulsion or legal obligation.

Michael V. Hernandez, *Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 117-18 (1997).

[6] Although a potentially liable party may reduce its potential liability if it voluntarily mitigates the harm it inflicted on another, this conduct does not entitle it to seek contribution from other parties. *See, e.g., In re Question Submitted by the United States Dist. Court for the Dist. of Colo. (Coniaris v. Vail Assocs., Inc.)*, 586 P.2d 224, 225 (Colo. 1978)) (explaining that under the common law of contribution, "[n]o cause of action accrues to a joint tortfeasor until there has been a judgment against him or a

Under the common law definition, Petitioners' status as potentially liable parties, by itself, plainly does not give rise to a claim for contribution. Under the statutory language of § 107(a), parties are liable solely for the costs incurred by someone else. Petitioners' hypothetical liability to the government under CERCLA, therefore, would convert Petitioners' claims into contribution claims *only if* the government were to incur response costs because, before then, no liability exists under CERCLA § 107(a).[7]

The status of "volunteers" under CERCLA § 113(f)'s express contribution provision is absolutely critical to resolution of the question presented.[8] Even courts that have limited potentially liable parties to claims under § 113(f) have expressed doubts over whether potentially liable parties who conduct "voluntary" cleanups fit

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settlement of the claim. A claim for contribution is an action separate and distinct from the underlying tort. The rights and obligations of the tortfeasors flow, not from the tort, but from the judgment or settlement itself.").

[7] Respondents have repeatedly referred to Petitioners as "admittedly liable parties." That characterization is flatly wrong. Petitioners have never admitted to being "liable parties." Petitioners have acknowledged only that they are in the class of potentially responsible parties set forth in CERCLA § 107(a), which means that they *would* be liable to another party or the government *if* that other party or the government were to incur cleanup costs in properly performing an environmental cleanup. No such party exists and, therefore, Petitioners are not properly characterized as "liable parties."

[8] The issue of voluntariness under the CERCLA statutory scheme has been the subject of much discussion. *See, e.g.*, Daniel R. Avery, *Statutory Right Or Statutory Prohibition? Reconciling CERCLA's Contribution Protection With The Private Response Cost Recovery Action*, 12 VA. ENVTL. L.J. 367, 371 (1993) (urging resolution of the split of authority by "employing a distinction between voluntarily and involuntarily incurred costs").

within the plain language of CERCLA § 113(f). Illustratively, in *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 119 (1995), the First Circuit acknowledged that a liable party's voluntary cleanup would "fall[] outside the statutory parameters established for an express cause of action for contribution." *Id.* at 99 n.8 (citing 42 U.S.C. § 9613(f)(1)).[9]

This case represents the only opportunity to address the statutory definition of "contribution" on a record that directly presents the issue.[10] To answer the question presented, this Court could focus exclusively on the statutory language of CERCLA § 107(a) and § 113(f) as applied to the assumed facts alleged in the Petitioners' complaint. No "external" facts are necessary or relevant to the question

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[9] Accordingly, if parties like Petitioners do not fall within the language of CERCLA § 113, yet the question presented is answered by divesting these parties of their § 107 claim, parties like Petitioners would not have a clear statutory remedy. Instead of resolving this dilema, however, the Ninth Circuit's ruling below merely departed from the established contribution principles by stating that Petitioners created liability to themselves in conducting their cleanup. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1305-06 (9th Cir. 1997).

[10] The more typical cases, such as the case currently pending before the Sixth Circuit, do not present this issue in the context of an unambiguous record. The plaintiffs in the Sixth Circuit case devoted portions of their appellate briefs to arguing whether an administrative order (as opposed to a judicial order) would render the plaintiffs' claim one in "contribution" at common law or under the statutory language. *See, e.g.*, Final Brief of Plaintiff-Appellants at 25-28, *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, (6th Cir. filed June 25, 1997) (No. 97-3163). Accordingly, review of the Sixth Circuit case (or any other typical CERCLA case) would require the Court to delve into similarly tangential issues. In contrast, the current petition would enable the Court to address the central point of the dispute without having to examine such arcana.

presented.[11] Given the dearth of voluntary cleanups, it is doubtful that such an ideal opportunity will arise again.

CONCLUSION

As the States and Cities have stated in their amici curiae brief in support of the Petition, the current confusion in the law will inevitably discourage private parties from engaging in the type of voluntary cleanup from which this case arises. Resolving the question presented would affect not only virtually every private CERCLA case, but also state and local governments' ability to address environmental contamination through privately funded voluntary cleanups.

Therefore, the Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[11] Commentators have noted that extraneous considerations have distracted interpreting courts from a more disciplined focus on the plain text of CERCLA § 107(a) and § 113(f). One such commentator even likened the federal courts' disjointed efforts to interpret the statutory provisions to the blind mens' efforts to describe an elephant in the famous parable. *See* Ann Alexander, *Standing under Superfund §§ 107 and 113: Avoiding the Error of the Blind Men and the Elephant*, TOXIC L. RPTR. (BNA) 155 (July 12, 1995) (analyzing the "firestorm" of litigation over the relationship between CERCLA §§ 107(a) and 113(f)).

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No. 97-795

In the Supreme Court of the United States

OCTOBER TERM, 1997

THE PINAL CREEK GROUP, ET AL., PETITIONERS

v.

NEWMONT MINING CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a private party that is concededly liable for the costs of responding to hazards at a mine site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, may recover response costs from other responsible parties by bringing an action for joint and several liability, rather than for contribution.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are a group of mining companies that are among the entities responsible for creating hazardous conditions in the Pinal Creek Drainage Basin (Pinal Creek Site). Petitioners have undertaken response activities to eliminate those hazards and have commenced this action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover their response costs from respondents, who also contributed to the hazardous condi-

tions at the Site. The United States District Court for the District of Arizona ruled that petitioners may maintain an action against respondents under Section 107 of CERCLA, 42 U.S.C. 9607, for joint and several liability. See Pet. App. 22-59. The court of appeals reviewed that ruling on interlocutory appeal, see 28 U.S.C. 1292(b), and reversed. Pet. App. 1-21. The court of appeals held that petitioners are limited to seeking contribution in accordance with Section 113 of CERCLA, 42 U.S.C. 9613. Pet. App. 20-21.

1. "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP), 42 U.S.C. 9604, which includes a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup, 42 U.S.C. 9605. See 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA additionally grants the President authority to issue orders and to seek injunctive relief to compel persons to respond to releases or threats of release. 42 U.S.C. 9606.[1]

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[1] The President has delegated most of his authority for administering CERCLA to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. 9615 note. The President has also delegated CERCLA response action authorities and responsibilities to the heads of other executive branch agencies with respect to facilities under their jurisdiction, custody, or control. *Ibid.*

CERCLA also provides a mechanism for financing government-initiated cleanups of hazardous waste sites. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against specifically identified categories of responsible persons (including facility owners and operators and persons who arrange for disposal of, or transport, hazardous substances) to recover the government's costs of response and replenish the Superfund. See CERCLA § 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A). The States and Indian Tribes may also bring actions under Section 107(a)(4)(A) to recover their costs of response. *Ibid.*

Section 107(a)(4)(B) allows private parties to recover necessary costs of response from the designated categories of responsible parties in certain circumstances; and, in conjunction with Section 113(f)(1), it allows responsible parties to seek contribution from other responsible parties. See 42 U.S.C. 9607(a)(4)(B), 9613(f)(1). Section 107(a)(4)(B) specifically provides that a private party may bring suit against a responsible person to recover "necessary costs of response incurred" that are "consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). Section 113(f)(1), which was added by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I, § 113, 100 Stat. 1647, additionally provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of

this title." 42 U.S.C. 9613(f)(1). Section 113(f)(1) directs that, in resolving contribution claims, the courts may allocate response costs among the liable parties based on "such equitable factors as the court determines are appropriate." *Ibid.*

2. Petitioners and their predecessors conducted mining operations at the Pinal Creek Site, which is located near the towns of Globe and Miami, Arizona. Those operations produced hazardous substances that have contaminated groundwater in the shallow aquifer underlying Pinal Creek, which is hydrologically connected to Maricopa County's residential water supply. The Arizona Department of Environmental Quality (ADEQ) initiated an investigation of the groundwater contamination, which prompted petitioners, who are concededly responsible parties under CERCLA, to begin State-approved response actions at the Site. Respondents, who are potentially responsible parties (PRPs) under CERCLA, have refused to participate in the cleanup or reimburse the State for its expenses. Pet. App. 3-4, 24-26.

In response, petitioners filed this action, which seeks, among other things, to hold respondents jointly and severally liable under Section 107(a)(4)(B) for the petitioners' response costs at the Site. Pet. App. 3-4, 23-24. Respondents resisted petitioners' claim for joint and several liability through motions for dismissal and judgment on the pleadings. *Id.* at 4, 24 Respondents contended that, because petitioners are themselves liable at the Site, their sole remedy against respondents is an action for contribution, which is specifically provided for in Section 113(f). *Id.* at 31-32. The district court denied respondents' motions, ruling that CERCLA grants a responsible party "standing" to assert a claim for joint and

several liability against other responsible parties at a site. *Id.* at 32.

The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). The court of appeals granted the petition and reversed. Pet. App. 1-21. The court of appeals concluded that Section 107(a)(4)(B) of CERCLA allows one jointly responsible party to sue another, but that the specific type of relief in that situation is spelled out in Section 113(f), which provides a right of contribution among jointly responsible parties. *Id.* at 7-8. The court noted that its conclusion is not only consistent with the text and legislative history of CERCLA, but "is consistent with statements by the Supreme Court, and by five other circuits, recognizing in contexts similar to this one, that a CERCLA claim by a PRP against another PRP is necessarily for contribution." *Id.* at 13.[2]

Since the court of appeals' decision, the State of Arizona and petitioners have submitted a proposed consent decree for entry by the same district court in which petitioners' action is pending. See Proposed Consent Decree Between the State of Arizona, the Arizona Department of Environmental Quality, and the Pinal Creek Group in *Arizona ex rel. Rhoades* v. *Cyprus Miami Mining Corp. et al.*, Civ. No. 97-1789 PHX SMM (complaint filed Aug. 22, 1997). The proposed consent decree would resolve petitioners' CERCLA liability to the State with respect to the Site and provide petitioners with protection from contribution suits by other liable parties, including respondents. See *id.* § 37, at 69-70; see generally CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2).

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[2] The United States participated in the court of appeals as an amicus curiae supporting reversal.

DISCUSSION

The Court should deny the petition for a writ of certiorari because this case does not satisfy any of the normal criteria for this Court's review. The court of appeals' decision, which addresses a narrow question of statutory construction, does not conflict with any decision of another court of appeals or otherwise present a question of exceptional importance warranting this Court's review in the absence of a conflict in the circuits. Furthermore, the court of appeals' decision is correct. This case presents an especially inappropriate occasion for this Court to address the question presented, because petitioners and the State of Arizona have submitted a proposed consent decree to the district court that, as a practical matter, would significantly alter the context in which this Court would decide the legal issues.

1. Every court of appeals that has addressed the question presented has held, as did the court below, that a responsible private party seeking recovery of response costs under CERCLA from another jointly responsible party may sue only for contribution to recover "that portion of its costs that are in excess of its *pro rata* share of aggregate response costs." *United Technologies Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995).[3] As petitioners acknowl-

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[3] This case involves an action by private parties under Section 107(a)(4)(B) of CERCLA, 42 U.S.C. 9607(a)(4)(B), and not an action by the United States, a State, or an Indian Tribe under Section 107(a)(4)(A), 42 U.S.C. 107(a)(4)(A). Accordingly, no question is presented here concerning the availability of joint and several liability in actions filed under Section 107(a)(4)(A).

edge (Pet. 13-14), those courts of appeals include the First, Third, Seventh, Tenth, and Eleventh Circuits. See, *e.g.*, *United Technologies Corp.*, *supra*; *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Rumpke of Indiana, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1239-1242 (7th Cir. 1997); *United States* v. *Colorado & Eastern R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996).[4]

The uniformity among the courts of appeals is not surprising. Their decisions rest on the familiar general principle, recognized in a variety of judicial and statutory contexts, that jointly responsible parties may obtain an equitable allocation of their common liability through the mechanism of a contribution claim. See, *e.g.*, *Northwest Airlines* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204, 207 (2d Cir. 1987); Restatement (Second) of Torts § 886A (1979); Uniform Contribution Among Tortfeasors Act (1955) (UCATA), § 1, 12 U.L.A. 194 (1996); Uniform Comparative Fault Act (1977) (UCFA), § 4, 12 U.L.A. 142 (1996); see also *Black's Law Dictionary* 328 (6th ed. 1990) (defining contribution as the

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[4] See also *Sun Co.* v. *Browning-Ferris, Inc.*, 124 F.3d 1187, 1190-1194 (10th Cir. 1997), cert. denied, 118 S.Ct. 1045 (1998); *Bancamerica Commercial Corp.* v. *Mosher Steel*, 100 F.3d 792, 799-800, amended, 103 F.3d 80 (10th Cir. 1996); *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 88-89 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989).

"[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear").[5]

Although petitioners acknowledge the uniformity of result among the courts of appeals, Pet. 13-14, they assert that the courts have relied on divergent rationales. Mere variations in the analysis or articulation of a governing principle do not give rise, however, to a conflict among the courts of appeals warranting this Court's review. As this Court has repeatedly stated, it "reviews judgments, not statements in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827).[6]

Petitioners speculate (Pet. 15-18) that the differences in rationales among the courts of appeals may someday lead to different results concerning issues such as the applicable statute of limitations or whether prejudgment interest may be recovered.

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[5] Indeed, Congress consciously modeled CERCLA's contribution provisions on well established legal principles, including those embodied in the UCATA. See *United States* v. *Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1048 (D. Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990).

[6] Petitioners note that one court of appeals has stated that a potentially responsible party may impose joint and several liability on other such parties if the former can show that it is, in fact, "blameless" for the pollution of the site. Pet. 18-20 (citing *Rumpke of Indiana, Inc.*, 107 F.3d at 1240). Petitioners, however, are concededly liable at the site in question here, and that distinction is not implicated in this case. See Pet. App. 14 n.5.

Those possibilities, however, are purely hypothetical matters that are not implicated here. This case was before the court of appeals on an interlocutory appeal of the denial of the respondents' motions for dismissal and judgment on the pleadings. Pet. App. 4-7. The court of appeals did not decide any of the speculative questions that petitioners posit, and this Court should not undertake to issue an advisory opinion on those matters.[7]

Petitioners and their amici, which include eleven States and seven cities, also urge that the question presented here is of exceptional importance warranting this Court's review because, in their view, a responsible party will not have sufficient incentive to engage in voluntary cleanup of a hazardous waste site if that party is limited to seeking contribution from other responsible parties. Pet. 27-30; Amici Br. 5. That policy perspective, however, is not necessarily shared by other States and cities. As we explain below, it is not shared by the United States. In light of the many significant issues presented to this Court, the question presented in this case is not sufficiently important to warrant the Court's review in the absence of a square conflict among the courts of appeals.

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[7] This Court has not addressed the specific question of whether a responsible party may sue another responsible party under CERCLA based on a theory of joint and several liability, rather than contribution. The Court has addressed, however, whether a private party may sue to recover attorney's fees as a "necessary cost[] of response" under Section 107(a)(4)(B). *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994). As the court of appeals noted (Pet. App. 13), its decision is consistent with *Key Tronic*. We discuss the relevance of *Key Tronic* in greater detail below.

2. The United States submits that review is also not warranted because the court of appeals' decision is correct. Section 107(a)(4)(B) of CERCLA provides that a responsible private party shall be liable for "necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). Section 107(a)(4)(B)'s reference to "any other person" is broad enough to allow one jointly responsible party to sue another for the former's response costs. See *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 (1994) (Section 107 "impliedly authorizes private parties to recover cleanup costs from other PRPs."). Section 107(a)(4)(B) does not describe, however, what form that liability should take. *Key Tronic*, 511 U.S. at 818 & n.11. Section 113 fills that void. When read in combination, the clear implication of Sections 107(a)(4)(B) and 113(f) is that the jointly responsible private party is limited to seeking contribution in accordance with Section 113(f).[8]

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[8] That construction is consistent with this Court's decision in *Key Tronic*. The specific issue in *Key Tronic* was whether a private party, which happened to be a responsible party, could recover attorney's fees under Section 107(a)(4)(B) as a "necessary" cost of response. 511 U.S. at 811. The Court ultimately ruled that Section 107(a)(4)(B) does not authorize recovery of attorney's fees associated with bringing a cost recovery action. *Id.* at 816-821. The *Key Tronic* decision describes the general contours of CERCLA liability, and it recognizes that a jointly responsible private party that incurs cleanup costs would have a right, as a general matter, to *contribution* from other responsible parties under Sections 107 and 113. *Id.* at 816. Although *Key Tronic* does not expressly preclude the assertion of other forms of liability, it does not suggest in any way that CERCLA allows a jointly responsible private party to assert

As the court of appeals recognized, an action by one jointly responsible party against another to recover the former's necessary costs of response under CERCLA is, in essence, an action to apportion their joint liability. Pet. App. 8. That action should take the traditional, familiar, and entirely "unremarkable" form of contribution, which Congress has expressly made available through Section 113(f). *Id.* at 8-9. As the court of appeals explained, "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." *Id.* at 9. See also, *e.g.*, *id.* at 11-12; *New Castle County*, 111 F.3d at 1120-1122; *Browning-Ferris*, 33 F.3d at 99-101.

The court of appeals' interpretation rests on a sensible construction of CERCLA's complementary provisions that fulfills the "classic judicial task" of reconciling several provisions of a statute enacted over time and "getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). The court of appeals correctly recognized that Sections 107 and 113 "work together—the first section creating the claim for contribution between PRPs, and the second qualifying the nature of that claim." Pet. App. 9. That understanding is reflected in other provisions of CERCLA, such as Section 113(h)(1), which makes reference to "[a]n action under section [107] to recover response costs or damages *or for contribution*." 42 U.S.C. 9613(h)(1) (emphasis added). The court's interpretation is also consistent with the legislative history of Section 113(f), which

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a claim of joint and several liability against other jointly responsible parties.

indicates that "Congress was only confirming and clarifying an existing claim for contribution under § 107." Pet. App. 8 (citing H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 18-19 (1985); S. Rep. No. 11, 99th Cong., 1st Sess. 43 (1985)); see also 131 Cong. Rec. 24,450 (1985)(statement of Sen. Stafford).

Petitioners dispute that interpretation and argue that Sections 107 and 113 should be viewed as creating independent remedies. They contend that a jointly responsible party that incurs response costs can simply invoke Section 107(a)(4)(B), without regard to Section 113(f), and sue some or all of the other responsible parties for the full amount of the cost of cleanup on the theory that the named defendants are subject to joint and several liability. In petitioners' view, the responsible party is entitled to avoid Section 113(f)'s provisions for allocating cleanup costs on an equitable basis through contribution from other responsible parties. See Pet. 10-12.

Petitioners' construction of CERCLA is unpersuasive because it rejects a straightforward and sensible interpretation in favor of an extraordinary construction that would reject familiar legal concepts and stultify CERCLA's contribution mechanism. As a general matter, we are aware of no precedent in the law for allowing a joint tortfeasor that has discharged some or all of its liability to sue another joint tortfeasor for joint and several liability. That approach would create an unworkable system of liability that would permit responsible parties to circumvent Section 113(f)'s mechanism for allocating response costs among jointly responsible parties "using such equitable factors as the court determines are appropriate." See 42 U.S.C. 9613(f)(1); Pet. App. 11-13. Indeed, petitioners seek to impose joint and several

liability on the other responsible parties precisely to avoid the equitable allocation that Congress provided for in Section 113(f). *Ibid.*

Petitioners repeatedly suggest (*e.g.*, Pet. 12, 13, 14, 21, 22, 23, 24, 25, 26, 27) that their construction is supported by the "plain language" of Section 107(a)(4)(B), but that refrain is simply not accurate. Petitioners assume that, because Section 107(a)(4)(B) provides a cause of action to "any other person" who has incurred response costs, those persons must necessarily have a cause of action for joint and several liability. That assumption, however, is unjustified. Section 107(a)(4)(B) does not state, or even suggest, that every person who has a cause of action is entitled to seek imposition of joint and several liability. Section 107(a)(4)(B)'s lack of specificity on the scope of a responsible party's rights should be resolved by reference to traditional legal principles, which instruct that the appropriate remedy for a jointly responsible party is the right of contribution set out in Section 113(f). See, *e.g.*, *County Line Investment Co.* v. *Tinney*, 933 F.2d 1508, 1515-1518 (10th Cir. 1991); cf. *Key Tronic*, 511 U.S. at 816.

Petitioners' construction not only lacks a foundation in the "plain language," but it would lead to incongruous results. If a jointly responsible party that has incurred response costs could impose joint and several liability on any other jointly responsible party, parties that have paid a CERCLA judgment or settled their liability would have a strong incentive to forgo CERCLA's contribution provisions and sue other responsible parties on a selective basis to recover the full amount of the judgment or settlement. The result would be a series of such suits, like this one, in which each party, or confederation of

parties, seeks to transfer its entire liability to another. "Such a joint and several approach would 'guarantee[] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.'" Pet. App. 13 (citing *T H Agriculture & Nutrition Co.* v. *Aceto Chem. Co.*, 884 F. Supp. 357, 361 (E.D. Cal. 1995)). See also, *e.g.*, *Town of New Windsor* v. *Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996); H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 80 (1985).

Petitioners contend (Pet. 10-12) that this problem can be contained by allowing only parties "who conduct environmental cleanups" to pursue joint and several liability. Section 107(a)(4)(B) provides no textual basis, however, for drawing a distinction between "working PRPs" and other responsible parties. See Pet. App. 14-16; see also, *e.g.*, *Browning-Ferris*, 33 F.3d at 101-103. Petitioners base that distinction on their view that creating it would advance CERCLA's policy of promoting voluntary cleanups. See Pet. 27-30. The court of appeals correctly refused to draw a policy-based distinction that finds no support in "the controlling text, structure, and logic of CERCLA." Pet. App. 16. See generally *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-189 (1994); *Pavelic & Le Flore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

Furthermore, the court of appeals was properly skeptical of the contentions, pressed by petitioners and their amici, that its holding would discourage voluntary cleanups. Pet. App. 16. Responsible parties, like petitioners, that own or operate a contaminated site are likely to have substantial business and civic incentives to clean up the site. *Id.* at 16-17.

The right to contribution provides a strong additional incentive to engage in a voluntary cleanup. As the court of appeals recognized, the courts are authorized to take into account a responsible party's cooperation with cleanup efforts when equitably allocating liability among responsible parties under Section 113(f)(1). See *id.* at 16; see also, *e.g.*, *Stearns & Foster Bedding Co.* v. *Franklin Holding Corp.*, 947 F. Supp. 790, 801 (D.N.J. 1996).[9]

Although petitioners emphasize (Pet. 28) that CERCLA was intended to encourage private parties to perform cleanups, that was not Congress's sole policy goal. Congress also sought to encourage settlement, achieve an equitable allocation of response costs among all responsible parties, minimize litigation and other transaction costs, and ensure that polluters pay the costs of cleaning up the

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[9] Petitioners' amici, like petitioners themselves, argue that responsible parties will undertake voluntary cleanups only if they have the additional incentive of a right to assert claims for joint and several liability against other responsible parties. Amici Br. 5, 10-16. It is telling, however, that the amici States have not conferred any such authority in their own hazardous waste cleanup statutes. We have found no instance in which any of the amici States currently has a provision in its state superfund statute authorizing a liable party to impose joint and several liability on another liable party. Indeed, Arizona recently amended its state superfund statute—the Water Quality Assurance Revolving Fund—to eliminate joint and several liability claims by private parties and by the State. Liability under the Arizona statute is now several rather than joint and several. Ariz. Rev. Stat. § 49-285(A) (1997). Similarly, the other amici States that provide a private right of action appear to authorize only actions by private parties for contribution. *E.g.*, Ohio Rev. Code Ann. § 3746.23 (Anderson 1997); Ga. Code Ann. § 12-8-96.1 (1996).

hazardous conditions they create. See 42 U.S.C. 9613(f)(1) and (2); Pet. App. 12-13; *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990); *Dravo Corp.* v. *Zuber*, 804 F. Supp. 1182, 1185-1188 (D. Neb. 1992), aff'd, 13 F.3d 1222 (8th Cir. 1994).

Section 113(f)'s contribution provisions play an important role in achieving those goals. The contribution provisions allow the court to weigh all the equitable factors relevant to a fair allocation of response costs among responsible parties. A private party that incurs response costs receives fair treatment, because that party is entitled to recover amounts paid in excess of its equitably allocable share, including its costs of "work performed in identifying other PRPs." *Key Tronic*, 511 U.S. at 820. The contribution provisions also promote judicial economy and reduce transaction costs by providing a single centralized forum for conducting the allocation, which would not necessarily be available if every responsible party could sue another for full recovery on a theory of joint and several liability. See, *e.g.*, *Tesa Tuck*, 919 F. Supp. at 681.

3. This case presents an especially inappropriate occasion for this Court to address the question presented, because petitioners and the State of Arizona have submitted a proposed consent decree to the district court that, as a practical matter, would significantly alter the context in which this Court would decide the legal issues. As noted above, the proposed consent decree would resolve petitioners' CERCLA liability to the State of Arizona with respect to the Site and provide petitioners with protection from contribution suits by other liable parties, including respondents, for the State's CERCLA claims. See p. 5, *supra*; see generally 42 U.S.C. 9613(f)(2).

The consent decree's provision for contribution protection is significant because petitioners assure the Court in their petition that, under their construction of CERCLA's liability provisions, "a liable CERCLA defendant must pay all the plaintiff's response costs, but then may seek to recover a portion of them from others, including a liable plaintiff, by prosecuting contribution counterclaims, cross-claims, or third-party claims." Pet. 12. Petitioners' assurance is inconsistent, however, with the contribution protection provisions of the proposed consent decree, which purport to preclude respondents from asserting a contribution counterclaim.

It appears that, unless they intend to forgo their claim of joint and several liability, petitioners seek to have the best of both worlds. They want the right to assert a claim for the full amount of their response costs against other responsible parties and the simultaneous right to be immune from contribution. That combination of rights would entitle petitioners to avoid liability for any of the response costs for the Site, notwithstanding petitioners' substantial responsibility for the hazardous conditions at the Site. The result petitioners apparently hope to achieve illustrates in a concrete way why their construction of CERCLA's liability provisions is flawed. There is no reason to believe that Congress intended to promote that palpable inequity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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OCTOBER TERM, 1997

THE PINAL CREEK GROUP, consisting of
CYPRUS MIAMI MINING CORPORATION,
INSPIRATION CONSOLIDATED COPPER COMPANY,
and BHP COPPER INC.,
Petitioners,

v.

NEWMONT MINING CORPORATION,
OCCIDENTAL PETROLEUM CORPORATION,
CANADIANOXY OFF-SHORE PRODUCTION COMPANY,
and ATLANTIC RICHFIELD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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OCTOBER TERM, 1997

No. 97-795

THE PINAL CREEK GROUP, consisting of
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS

On June 3, 1998, petitioners filed a "Supplemental Brief" to respond to the brief filed by the Solicitor General. Respondents question the propriety of petitioners' use of Rule 15.8 as a means to file yet another brief with this Court after the Solicitor General has responded to this Court's invitation to express his views in this case. The petitioners' Supplemental Brief does not concern "new cases, new legislation, or other intervening matter" as required by the Rule. Nevertheless, if petitioners' supplemental briefing is allowed, then respondents seek leave to file this response.

Petitioners concede that the Solicitor General was correct in noting "that there is no direct conflict among the circuit courts." Pet. Supp. Br. 2. However, petitioners assert that "a number of factors combine to render that consideration less significant" in this case. *Id.* The statements petitioners make to support that assertion are incorrect.

First, petitioners contend that "there is no dispute that the district courts are hopelessly divided, as several courts have expressly noted." Pet. Supp. Br. 2. Petitioners support this statement with a citation to three district court decisions that were decided between 1995 and early 1997. *Id.* (citing cases found in Pet. 8 n.4). Although, as respondents noted in their motion seeking interlocutory review (and several law review articles also observed), there used to be significant conflicts among the district courts, the state of the case law is now largely uniform. Most of the district court decisions allowing PRPs to assert joint-and-several claims—*including the three cases cited by petitioners*—have been reversed or overruled by the appellate courts in their respective circuits. *E.g., Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Ariz. 1996), *rev'd,* 118 F.3d 1298 (CA9 1997); *Crofton Ventures Limited Partnership v. G & H Partnership,* No. MJG-96-1378, 1997 U.S. Dist. LEXIS 8067, at *8 (D. Md. Jan. 31, 1997) (allowing a PRP to assert joint and several claim) (overruled *sub. silentio* by *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*, —— F.3d ——, Nos. 97-1593, 97-1594 and 97-1599, 1998 WL 206116, at *4 (CA4 Apr. 29, 1998) (limiting PRPs to a contribution remedy); *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221 (E.D. Pa. 1995) (overruled *sub silentio* by *New Castle Co. v. Halliburton NUS Corp.*, 111 F.3d 1116 (CA3 1997)). All the circuit courts that have faced the issue (including the First, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits) have held that liable parties—and potentially liable parties that are not entirely in-

nocent as to the pollution at issue—can assert only a contribution claim againt other PRPs under CERCLA. As a result of the consensus among the circuit courts, at latest count, nearly thirty district court decisions—the vast majority—have arrived at the same conclusion, including virtually all the recently published decisions. *E.g., Kalamazoo River Study Group v. Rockwell Int'l*, 991 F. Supp. 890 (W.D. Mich. 1998); *Town of Oyster Bay v. Occidental Chem. Corp.*, 987 F. Supp. 182, 208-08 (E.D.N.Y. 1997); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684, 689 (N.D. Ind. 1997); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1266 n.2, 1269 (E.D. Cal. 1997); *Clear Lake Properties v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 765 (S.D. Tex. 1997). At this point, the state of the law in the lower courts could hardly be more uniform.

Second, petitioners contend that the Solicitor General "surely goes too far in speaking of 'the uniformity among the courts of appeals.' " Pet. Supp. Br. 2 (citing SG Br. 7). The Ninth Circuit decided one issue, however, and one issue only: "whether [CERCLA] provides a party who is partly liable for the cleanup of a hazardous waste site with a claim against other potentially responsible parties ('PRPs') for joint and several recovery of the totality of its cleanup costs." Pet. App. 3. Like every other circuit court that has faced the issue, the Ninth Circuit answered that question "in the negative." *Id.* Petitioners contend that the difference in the reasoning of the circuit court opinions may lead to a conflict on several other issues such as (1) whether a "blameless" PRP may sue for joint and several liability, and (2) which statute of limitations applies to CERCLA contribution claims. Pet. Supp. Br. 3. As both the Ninth Circuit and the Solicitor General noted, these issues are entirely hypothetical on the record before the Court in this case because, among other things, petitioners are admittedly liable for the pollution at this Site, and no statute-of-limitations issue is implicated here. Pet. App. 14 n.5, 17; SG Br. 8 n.6, 9. Moreover, petitioners sidestep the fact that, in any event, these

tertiary issues are not worthy of certiorari at this time. *See, e.g., M&M Realty Co. v. Eberton Terminal Corp.*, 977 F. Supp. 683, 686 (M.D. Pa. 1997) (noting that every court that has considered the issue has concluded that a "blameless" landowner can sue for joint-and-several liability).

Third, petitioners contend that "although the United States may be content with the unsettled state of the law, the States and the cities are not, and have joined petitioners in urging this Court to grant review. Pet. Supp. Br. 4. In truth, despite petitioners' best efforts, only a handful of states and cities signed onto the *amicus* brief in support of their petition. As the Solicitor General noted, moreover, it is telling that even though the *amici* states urge the Court to read into CERCLA a joint-and-several remedy for policy reasons, none of these states have enacted laws within their own jurisdictions giving PRPs the right to sue other PRPs for joint-and-several liability. SG Br. 9. Indeed, the State of Arizona recently amended its state superfund statute to eliminate joint-and-several claims even by the state itself. Liability under Arizona's statute is now several only, Ariz. Rev. Stat. § 49-285(A) (1997), and the statute precludes Arizona's own enforcement agencies from using *CERCLA's* liability provisions to circumvent this several-only liability scheme, except under very narrow circumstances not applicable here. *Id.* at § 49-287(B).

Fourth, petitioners contend that the brief of the Solicitor General, which was requested by this Court, should be discounted because it represents the views of the United States, which is sometimes a CERCLA defendant. Pet. Supp. Br. 5-7. If such allegations merit any response at all, respondents note that the Solicitor General also represents the Environmental Protection Agency, the primary enforcer of CERCLA, whose lawyers were listed as "Of Counsel" on the brief the United States filed in the Ninth Circuit in this case.

Fifth, petitioners challenge the reasoning of the Solicitor General because he began his discussion with reference to "familiar general [common law] principles," rather than the "plain language" of CERCLA. Pet. Supp. Br. 7. As the Solicitor General correctly notes, "[p]etitioners' construction not only lacks a foundation in the 'plain language,' but it would lead to incongruous results." SG Br. 13. As numerous courts, including the Ninth Circuit below, have held, section 107(a) implies a cause of action in favor of liable private parties, but it simply does not define the nature of the remedy available to such parties. Pet. App. 8. Section 107(a) emphatically does not give liable private parties a claim for "joint and several liability." However, an "impressive collection of signposts," as the First Circuit described them in *United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101 (CA1 1994), *cert. denied*, 513 U.S. 1183 (1995), including the text of section 113, the structure of the statute, the legislative history underlying the act, and the familiar common law principles incorporated into CERCLA, all demonstrate that claims by and between liable parties are by definition contribution claims, governed by the principles embodied in section 113 of the statute. Petitioners can ignore these signposts in their argument, but their refrain to the plain language of CERCLA is, as the Solicitor General has noted, "simply not accurate." SG Br. 13.

Sixth, petitioners contend that the Solicitor General has attempted to "muddy the waters" by making reference to a proposed consent decree between petitioners and the State of Arizona that has been filed in the same district court in which this case is pending. Pet. Supp. Br. 10. It is petitioners who are seeking to muddy the waters, however, by asking this Court to grant certiorari in this case even though its posture would change dramatically after the Court accepted review, if the decree were entered. The proposed decree, if approved, will indisputably implicate statutory provisions not currently at issue in this case.

The petition asks the Court to determine whether a liable or potentially liable party can assert joint-and-several claims under Section 107(a) of CERCLA against other PRPs. Pet. (i) (Question Presented). As such, the issue resolved by the Ninth Circuit and currently presented by the petition is whether the Pinal Creek Group has a claim for joint-and-several liability under section 107(a), or alternatively a claim for contribution under sections 107(a) and 113(f)(1).

Should the decree be entered, other sections of CERCLA, namely sections 113(f)(2) and (f)(3), will come into play. Section 113(f)(2) provides that a party who has settled with a state or the federal government "shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613 (f)(2). Section 113(f)(3)(B) provides, in turn, that a settling party "may seek contribution from any person who is not a party to the settlement referred to in paragraph [(f)](2)." Those provisions, which are not at issue at this point, will govern this case should the decree be entered.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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Petitioners,

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Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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For The Ninth Circuit

SUPPLEMENTAL BRIEF

Petitioners submit this Supplemental Brief pursuant to S. Ct. Rule 15.8 to respond to the brief filed by the Solicitor General in response to this Court's invitation. See 118 S. Ct. 1116 (1998).

1. The Solicitor General argues against certiorari on the ground that there is no direct conflict among the circuits. SG Br. 6. As we noted in the petition, petitioners' position has not prevailed at the circuit level. See Pet. 13-14. Nevertheless, a number of factors combine to render that consideration less significant here than in the typical case:

First, there is no dispute that the district courts are hopelessly divided, as several courts have expressly noted. See Pet. 8 n.4 (citing cases noting conflict). This Court has granted certiorari to resolve conflicts between district and appellate courts, where, as here, those differences indicate confusion among the lower courts on an important question of law. See, e.g., Calhoon v. Harvey, 379 U.S. 134, 137 & n.10 (1964); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 646 n.9 (1981); Newport v. Fact Concerts, Inc., 453 U.S. 247, 257 n.14 (1981).

Second, the Solicitor General surely goes too far in speaking of "[t]he uniformity among the courts of appeals." SG Br. 7. The circuits have embraced a bewildering array of competing rationales -- a not surprising consequence of abandoning adherence to the plain language of the statute. See Pet. 14-20.

Some circuits hold that Sections 107 and 113 are separate remedies, and potentially responsible parties ("PRPs") may proceed only under Section 113. Others hold that PRPs may bring an action under Section 107, but that the action is governed by Section 113. This split makes a difference in deciding whether particular features of the statutory scheme that are different under Sections 107 and 113 (such as the applicable statute of limitations and the availability of certain defenses) apply to the action. The Seventh Circuit has attempted to ameliorate the adverse impact of a ruling that PRPs may not proceed under Section 107 by rewriting the statute even further, and holding that "blameless" PRPs may bring such an action. All the confusion caused by these divergent and multiplying theories is of course eliminated by petitioners' plain language reading.

Third, commentators have agreed that the decided cases are "muddled and conflicting," Michael V. Hernandez, Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought By Potentially Responsible Parties, 21 Harv. Envtl. L. Rev. 83, 135 (1997), and that "prompt resolution of this issue is vital." Ivy Barton-Wagner, Setting CERCLA Straight: A Solution to the Dispute over Actions by Liable Remediators Under 107 and 113, 14 Temp. Envtl. L. & Tech. J. 207, 208 (1995).

Fourth, although the United States may be content with the unsettled state of the law, the States and cities are not, and have joined petitioners in urging this Court to grant review. See Br. for the State of Alabama, et al., as Amici Curiae in Support of Petitioners. This is particularly significant because the lion's share of responsibility for seeing to the cleanup of contaminated sites across the country rests not with the Federal Government, but with the States and local government.

Fifth, at least when it was in their interests to do so, respondents themselves acknowledged that the issue was "hotly debated and inconsistently resolved both within the Ninth Circuit and around the country." See Pet. 5-6 (quoting respondents' motion seeking interlocutory appeal).

Sixth, the existing state of confusion is particularly unacceptable in the context of the administration of an important and time-sensitive federal statutory program. Nearly two decades after CERCLA's enactment, the meaning of the key liability provision is unsettled and will remain so unless this Court acts. For the reasons explained in the Petition (at 27-30) and in the States' Amicus Brief (at 10-16), the unsettled state of the law on the question presented frustrates the achievement of CERCLA's goal of encouraging the prompt cleanup of contaminated sites.

Awaiting a direct circuit conflict before resolving the acknowledged confusion in the lower courts would simply perpetuate that frustration of Congress' important objectives.

2. The Solicitor General suggests that the question presented is not important enough to merit the Court's attention, SG Br. 9, a judgment with which the States, municipalities, and commentators disagree. In announcing this policy judgment, the Solicitor General neglects to alert the Court to the fundamental conflict of interest the United States faces under CERCLA. For while the Federal Government has enforcement responsibilities under CERCLA, it is also far and away the Nation's worst polluter -- more responsible for contamination at CERCLA sites than any other entity -- and is itself subject to liability under CERCLA. 1/

CERCLA expressly provides that the United States is liable under its terms "in the same manner and to the same extent" as private entities. 42 U.S.C. § 9620(a)(1). The Solicitor

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1/ The National Priorities List -- EPA's list of federal Superfund sites -- includes a federal facilities section with 151 Department of Defense, Energy, and Interior sites. 40 C.F.R. Part 300, App. B, Table 2. In addition, EPA estimates that the Department of Defense is responsible for more than 21,000 potentially contaminated sites, Energy for 10,000, and Interior for 26,000. EPA, Federal Facilities Restoration and Reuse Office, http://www.epa.gov./swerffrr.

General's position on the question presented -- restricting the right of private parties voluntarily undertaking a cleanup to recover their response costs from other responsible parties -- reflects more the Federal Government's position as a likely defendant than its position as an enforcer of CERCLA's provisions or an advocate for the prompt cleanup of contaminated sites. 2/

There is of course nothing wrong with the Solicitor General taking into account the need to defend his client in actions brought under CERCLA in determining what the position of the United States should be on the merits and whether review by this Court is appropriate, but the Court should appreciate that Congress had different considerations in mind when it subjected the Federal Government to liability, and has been pointedly critical of the Federal Government's responsiveness to the concerns underlying CERCLA. See, e.g., 132 Cong. Rec. 14902-03 (daily ed. Oct. 3, 1986) (Federal facilities tend to respond "slowly and tentatively" to even the "most notorious situations;"

2/ The United States has been more candid in prior filings, noting before the Ninth Circuit, for example, that "the United States is involved as a responsible party at many CERCLA sites and is often perceived as a 'deep pocket.'" Br. Amicus Curiae in National Am. R.R. Passenger Corp. v. BPJ Int'l, No. 95-56734 (9th Cir. 1997).

"[n]o loophole, it seems, is too small to be found by the Federal Government") (Sen. Stafford).

3. On the merits, the Solicitor General begins his statutory analysis by invoking a "familiar general principle" found in authorities such as the Restatement, the Uniform Laws, and Black's Law Dictionary, and suggests that resolving the question presented calls upon courts to "reconcil[e]" and "make sense" out of different statutory provisions enacted over time. SG Br. 7, 11.

That is conspicuously not the approach to statutory interpretation adopted by this Court. This Court has reiterated time and again that "[i]n a statutory construction case, the beginning point must be the language of the statute," Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) -- not "general principle[s]" drawn from outside the legislative process.

There is in any event no need to address the common law principles the Solicitor General invokes concerning joint and several liability. The statute itself explicitly defines the recovery available under Section 107 in plain terms: "any other person" may recover "any * * * costs of response" it incurred in a cleanup consistent with the national contingency plan. The

language is not only plain, it is exceptionally broad -- any person, any costs of response. See Bennett v. Spear, 117 S. Ct. 1154, 1162 (1997) (phrase "any person," though of "remarkable breadth," should be taken at "face value"); Salinas v. United States, 118 S. Ct. 469, 473 (1997) ("The word 'any' * * * undercuts the attempt to impose [a] narrowing construction.").

The Solicitor General, however, argues that some persons may not bring an action under Section 107 to recover any response costs they incurred. Reading exceptions into the statute that cannot be found in the plain language, the Solicitor General argues that petitioners cannot be considered "any person" entitled to recovery under Section 107 because they are themselves responsible parties liable for cleanup costs, and therefore are limited to an action for contribution under Section 113. This, according to the Solicitor General, is because of the "familiar general principle" that "jointly responsible parties may obtain an equitable allocation of their common liability through the mechanism of a contribution claims." SG Br. 7.

When Congress wanted to limit rights of action under CERCLA to parties who were not liable for cleanup costs, however, it did so expressly. Thus, Section 106 affords a right of action for recovery of costs incurred by parties conducting a cleanup

pursuant to EPA order, but Congress expressly limited the remedy to a party who can "establish * * * that it is not liable for response costs under section [107(a)]." 42 U.S.C. § 9606(b)(2)(C). The Solicitor General's construction would read into Section 107 a similar limitation that Congress did not enact.

The Supreme Court cautioned against just such judicial revision 180 years ago: "It would be dangerous in the extreme to infer * * * that a case for which the words of an instrument expressly provide, shall be exempted from its operation." Sturges v. Crowninshield, 4 Wheat. 122, 202 (1819) (quoted in Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)). Germain is, in many respects, quite similar to this case. The Court was confronted in that case with two statutory provisions arguably governing the jurisdiction of the federal courts of appeals over bankruptcy cases. A specific bankruptcy provision, 28 U.S.C. § 158(d), authorized appeal only of final judgments. A general provision, 28 U.S.C. § 1292, conferred jurisdiction on the courts of appeals to review certain types of interlocutory orders. Just as the Solicitor General here argues that Sections 107 and 113 can be "reconcile[d]" by reading the contribution limits in Section 113 into the general right of action provided

by Section 107, so too the respondent in Germain argued that the limits of 28 U.S.C. § 158(d) must be implicitly incorporated into 28 U.S.C. § 1292.

This Court resoundingly rejected that approach to statutory construction. The plain language of Section 1292 gave the right to appeal certain interlocutory orders, with no exception in the statute for bankruptcy cases, and this Court refused to read such an exception into the statute. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." 503 U.S. at 253 (citation omitted). So too here a court can give effect to the plain language of both Section 107 and 113; there is no need to depart from the broad and unrestricted text of Section 107 because of the existence of Section 113, and no basis for restricting Section 107 because of alleged "general principle[s]" found elsewhere in the law.

4. The Federal Government concludes its brief with a transparent attempt to muddy the waters by discussing a consent decree submitted by the State of Arizona and petitioners in a separate case, but not yet approved by the district court. SG Br. 16. The consent decree cannot and does not have any effect on the pertinent facts in the present case or on the applicable

law. Contrary to the Solicitor General's suggestion, the consent decree does not provide petitioners complete contribution protection for all their cleanup costs. The Solicitor General's objections are therefore misplaced and do not concern the question before the Court.

That question -- whether petitioners may bring a claim under Section 107 of CERCLA, assuming the truth of their allegations -- is purely a question of statutory interpretation. The court below, like other circuit courts, see Reply Br. 3, recognized the importance of that issue and the unsettled state of the law in granting an interlocutory appeal. This Court should grant certiorari to resolve the question and bring needed clarity to an issue affecting the cleanup of thousands of contaminated sites across the country.

CONCLUSION

For the foregoing reasons, and those in the petition and the brief of amici curiae States and municipalities, the petition should be granted.

Respectfully submitted,

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